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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

Petitioner,

v.

JESSE RODRIGUEZ, MODESTO HERRERA, SADRACH PEREZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, East Texas Motor Freight, Inc., hereby requests the issuance of an order granting *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 25, 1974. Petition for Rehearing denied August 18, 1975.

OPINIONS BELOW

The opinion for the Court of Appeals for the First Circuit, dated November 25, 1974, is reported at 505 F.2d 40 and is reprinted in Appendix B hereto the Notice of the Order on the Petition for Rehearing is dated August 18, and appears at Appendix C. The decision for the United States District Court for the Western District of Texas dated March 22, 1973, is reported at 6 CCH EPD ¶8815 and is reprinted in the Appendix A hereto.

JURISDICTION

Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 e-2 and 42 U.S.C. § 1981 seeking relief for themselves and members of a class. The District Court found that the cause of action was inappropriate for a class action and that none of the Defendants had violated Title VII or Section 1981.

The judgment of the Court of Appeals reversing the District Court's decision was entered on November 25, 1974. Petitioner's timely Petition for Rehearing was denied on August 18, 1975. This petition for *certiorari* is filed within 90 days of that date. The Court's jurisdiction is invoked under 23 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals, consistent with due process, may ignore a pre-trial stipulation, and *sua*

sponte make a finding of liability without affording the Defendant an opportunity to present evidence to the District Court.

2. Whether absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class, the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class.

3. Whether the Court of Appeals properly relied on undifferentiated statistical evidence in entering a finding of liability in favor of the Plaintiff class.

STATUTORY PROVISIONS INVOLVED

Section 703 of Title VII of the Civil Rights Act of 1974, 42 U.S.C. §2000 e-2:

"It shall be an unlawful employment practice for an employer–

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.:

Civil Rights Act of 1870, 42 U.S.C. §1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

Rule 23 of the Federal Rules of Civil Procedure:

" (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to

the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

STATEMENT OF FACTS

East Texas Motor Freight (ETMF) is an interstate common carrier by motor truck of general freight. It operates in 19 states with 52 terminals extending from the Pacific Coast across the southern United States to Atlanta, Georgia, and up into the middlewest as far as Chicago, Illinois, and Toledo, Ohio. ETMF conducts its

business by carrying loads of merchandise between cities within the ETMF system in ten-speed tractors with semi-trailers driven by "road drivers." Freight is collected from customers and delivered to ETMF terminals and picked up from terminals and delivered to customers in smaller, compact equipment driven by "city drivers." In conformance with the practice in the trucking industry, ETMF assigns or "domiciles" road drivers at a relatively small number of its terminals: those in locales that are relay points connecting major freight centers and those in "head-haul" cities which generate a significant amount of freight to other points in the company's system. For example, in the State of Texas, ETMF has six terminals that domicile road drivers and fifteen terminals that do not. On the other hand, ETMF has city drivers at all terminals.

Each terminal in the company's system is an independent profit center. Thus, each terminal maintains primary responsibility for hiring its own personnel. Although the corporate office approves each applicant for employment, the terminal manager makes the affirmative decision to hire and assumes responsibility for that decision. In order to preserve the profit-center concept of internal accountability, ETMF has a general policy prohibiting transfer between terminals.[1] The rationale for this policy is that to allow employees to transfer from terminal to terminal would visit one manager's hiring mistake on a colleague at another terminal. Furthermore, to allow a manager in one city to hire for employment at a terminal in another city

[1] The company is required by its collective bargaining agreement to allow transfer in certain limited circumstances, such as in the event of layoff.

dilutes hiring responsibility and the profit-center concept of internal accountability.

ETMF's qualifications for road drivers are more stringent than for city drivers. Road drivers must be at least twenty-seven years old and have three years of "immediate prior line-haul road experience." City drivers, on the other hand, must be at least twenty-one years old and have at least one year pickup and delivery experience. City drivers and road drivers are covered by different collective bargaining agreements. ETMF also has a "no-transfer" policy prohibiting the transfer of drivers between the city and road-driver classification.[2] The "no-transfer" between job classifications policy was motivated by safety considerations. During the 1950's, ETMF's poor safety record had caused the ICC Department of Transportation to suspend ETMF's authority to haul certain classes of government freight. These events led the company to implement the stricter set of qualifications for road-driver personnel referred to, *supra*. In order to maintain its high standards for road drivers, the "no-transfer" rule between classifications was imposed.

The named Plaintiffs below were employed at ETMF's San Antonio terminal. The San Antonio terminal employs only city drivers. ETMF has never actively employed road drivers at that location. The named Plaintiffs' claims turned on written inquiries for

[2] For thirty days in January and February of 1972, to ease morale problems among its city drivers, ETMF relaxed its "no-transfer" policy at selected road domiciles and permitted city drivers to transfer to the road driver classification, providing they could meet the road-driver qualification.

employment as road drivers submitted to the San Antonio terminal manager in August, 1970. At that time, ETMF was hiring no new road drivers because of a contractual obligation to recall drivers on layoff status before hiring persons from outside the company. When the company resumed hiring into the road-driver classification in March, 1971, Plaintiffs were not considered as applicants because they had expressed their interest in the jobs at the San Antonio terminal which was not a road domicile.

Furthermore, none of the Appellants satisfied the company's over-the-road driver requirements. Appellant Rodriguez had no road-driver experience and, at the time of his inquiry concerning road jobs, had been involved in two on-the-job accidents and had incurred three injuries to himself, resulting in Workmen's Compensation. At the time of their inquiries, Messrs. Herrera and Perez had no prior road driving experience. Additionally, Mr. Herrera had been involved in on-the-job accidents and had sustained personal injuries.

The three named Plaintiffs filed written charges with the Equal Employment Opportunity Commission, complaining that the policies of ETMF, Local 657 of Teamsters Union and the Southern Conference of Teamsters, relegated Mexican-Americans and blacks to city-driver jobs. After receipt of their "right to sue" letters in October of 1971, the Plaintiffs filed an action alleging discrimination against themselves and members of the class described as follows:

> "That the appropriate class should consist of all of Defendant East Texas Motor Freight's Mexican-American and Black City Drivers included in the Collective Bargaining Agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally, that such class should properly be composed of all Mexican-American and Black applicants for line driver positions with East Texas Motor Freight included in the above by the Southern Conference of Teamsters from July 2, 1975, to present." (*Rodriguez v. East Texas Motor Freight*, Complaint ¶12)

Despite this characterization of the case as a class action, the parties stipulated that the only issue at trial would be ETMF's liability to the individual Plaintiffs (App. D at 3d). Following trial, the United States District Court held that the claims of the individual Plaintiffs were without merit and, even though no evidence had been directed at the class claims, that the litigation could not properly be maintained as a class action. On appeal, the Court of Appeals reversed the decision of the District Court and held that the case was appropriate as a class action. Although the Court of Appeals agreed that Plaintiffs had offered no proof concerning liability to the sub class of Mexican-American and black *applicants* for line-driver positions, they held that the appropriate class was that which Plaintiffs had styled:

> "[A]ll of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas." (App. B at 25b-26b)

Finally, the Court of Appeals held that ETMF was liable to members of that class.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DEPRIVED PETITIONER OF ITS FUNDAMENTAL RIGHT TO PRESENT A DEFENSE IN THAT IT DECIDED QUESTIONS OF FACT AND LAW UPON WHICH NEITHER EVIDENCE NOR ARGUMENTS WERE PRESENTED TO THE TRIAL COURT.

It is essential to the concept of due process that the Defendant in a civil action be given adequate notice of the nature of the claim against him and be given the opportunity to present his defense. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679 (1929); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917). This notion is so ingrained in our system of law that the Supreme Court, in an early decision, said:

> "By the general law of the land, no court is authorized to render judgment or decree against anyone, or his estate, until after due notice by service of process to appear and defend. . . .The reason of the rule is founded in the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without an opportunity of defending the right." *Hollingsworth v. Barbour*, 4 Peters 466, 472, 475 (1830).

The Court has consistently rejected incursions on the constitutional requirements of notice and hearing. For example, trial on one issue or theory will not suffice to protect Defendant's due process rights when the ultimate decision turns on another issue or theory.

Thus, in *Saunders v. Shaw, supra*, the Court reversed the decision of a state supreme court in order to protect the Appellant's due process right to present his defense, saying:

> "Probably the majority of [the state] supreme court thought it was so plain on uncontroverted facts that the [Defendant was liable] that to remand it would be an empty form, – a mere concession to technicality. It may turn out so, *but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.*" *Id.* at 319. (emphasis supplied)

Similarly in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Court remanded to allow the Plaintiff to plan his trial strategy and try his case in light of the burden of proof articulated therein even though it was unlikely that new facts would be presented at the trial. *Id.* at 799-800.

Despite the Court's consistent holdings affirming the due process imperatives of notice and hearing, the Court of Appeals imposed potentially staggering liability in favor of the Plaintiffs' class without affording the Petitioner its right to present evidence in its defense. If the Court allows this decision to stand, it will be precedent for a double standard of procedural due process and will effectively deprive Defendants in Title VII actions of the constitutional rights afforded litigants generally by *Saunders v. Shaw, supra*. Nothing in Title VII warrants this conclusion and, indeed, the due process clause of the Fifth Amendment prohibits it.

A brief review of the history of this case will serve to illustrate that the Court of Appeals' action represented

a gross deviation from our traditional concepts of procedural fairness.

When this case was tried in the District Court for the western district of Texas, the parties agreed to detailed stipulations[3] which included the following:

> "The only issue presently before the court pertaining to the company is whether the failure of the Defendant, East Texas Motor Freight, to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981." The standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory."

The opinion of the District Court incorporated the stipulated facts and found that the Plaintiffs had not been discriminated against by ETMF's refusal to consider their applications for transfer to the road and, furthermore, that a class action was inappropriate. On appeal, the Plaintiffs did not argue that the trial court should have disregarded the stipulations. Rather, they argued that the trial judge had applied the wrong burden of proof to the individual Plaintiffs; that the District Court had made a clearly erroneous finding that Defendant's practices were supported by business necessity and, finally, that the lower court had erred in dismissing the class action because the class action question had never been considered by the lower court. The Appellants asked for reversal on the issue of liability to the individual Plaintiffs and remand for a determination of the appropriateness of the class under Rule 23. (Plaintiffs' brief to the Court of Appeals, p. 48.)

[3]The stipulations are set forth in their entirety at app. D.

Thus, the parties are in agreement that ETMF was never put on notice prior to or during the trial of this cause that it would be necessary to introduce evidence regarding the appropriateness of, much less the liability to, the class. Nor was the Defendant on notice that notwithstanding the stipulations agreed to by the parties and accepted by the District Court, ETMF would have to introduce evidence to justify its past hiring practices and the experience requirements for line drivers. Furthermore, since the named Plaintiffs were patently not qualified for the position of road driver, Defendant was not confronted with the necessity of showing the justification for refusal to consider the applications of qualified drivers.

There is no question that ETMF's reliance upon the pre-trial stipulations was reasonable. The rule in the Fifth Circuit with regard to the binding effect of pre-trial stipulations was stated in the case of *Laird v. Air Carrier Engine Service*, 263 F.2d 948 (5th Cir. 1959) as follows:

> "Those statements or agreements which dispense with proof of facts are made with respect to the impending trial and, until withdrawn, are not merely evidence as in the case of an ordinary admission. *They are absolutely binding. As long as they stand, they foreclose the matter altogether.*
>
> * * *
>
> Any other rule would largely destroy the utility of pretrial." (emphasis supplied) *Id.* at 953-54. *Accord, Risher v. United States*, 465 F.2d 1, 5 (5th Cir. 1972).

Seen in this context, the action of the Court of Appeals in this case is constitutionally indefensible.

The parties had stipulated that the *only* issue before the Court was the Defendant's failure to consider Plaintiffs' applications for transfer: the Court of Appeals determined that the case was appropriate for a class action, that the class was one of two subclasses alleged by the Plaintiffs, and that the Defendant was liable to the class. The parties stipulated that the named Plaintiffs were hired without regard to race, color, or national origin; the Court of Appeals found that the company had discriminated against the Plaintiffs' class in hiring and that the effects of this discrimination were perpetuated. The parties stipulated that the company's line driver requirements (including the requirement of three years immediately preceding over the road experience) were not discriminatory and supported by business necessity; the Court of Appeals held that Defendant's experience requirements were discriminatory.

Thus, it is evident that the Court of Appeals' decision represented far more than a departure from the "clearly erroneous" standard traditionally used by Court of Appeals in reviewing the trial court's findings of fact. *See Martin v. Thompson Tractor Co.*, 486 F.2d 510, 511-12 (5th Cir. 1973) (Fifth Circuit will apply the "clearly erroneous" standard in reviewing Title VII cases). The court made factual findings and legal conclusions contrary to stipulations and on issues which neither party had submitted to the District Court for decision.

A careful reading of the court's opinion indicates that its reasoning can be reduced to the following syllogism:

> 1. The Court of Appeals for the Fifth Circuit and other federal courts have found many trucking employers to be liable to a class of minority city drivers because of no-transfer rules and separate seniority lines. *See*, e.g., *Thornton v. East Texas Motor Freight*, 6 Cir. 1974, 497 F.2d 416; *Witherspoon v. Mercury Freight Lines, Inc.*, 5 Cir. 1972, 457 F.2d 496; *Hairston v. McLean Trucking Co.*, M.D. N. C. 1974, 62 F.R.D. 642; *United States v. Navajo Freight Lines Inc.*, C.D. Calif. 1973, 6 F.E.P. Cases 274; *Sabala v. Western Gillette, Inc.*, S.D. Tex. 1973, 362 F.Supp. 1142; *United States v. Lee Way Motor Freight, Inc.*, W.D. Okl. 1973, 7 E.P.D. ¶9066; *Sagers v. Yellow Freight System, Inc.*, N.D. Ga. 1972, 6 E.P.D. ¶8885.
>
> 2. The Defendant is a trucking employer, and Plaintiffs allege liability to a class based on no-transfer rules and separate seniority lines.
>
> 3. Therefore, Defendant must be liable to the class of minority city drivers.

No matter how many trucking company cases had been decided previously, the Defendant was entitled to present its defense in *this case*. While deprivation of this right alone is sufficiently egregious to justify the granting of *certiorari*, the harm to the Petitioner is compounded by the fact that the Fifth Circuit's "guilt by association" reasoning is logically unsound.

This case is not like other trucking industry decisions cited by the Fifth Circuit. In all of those prior cases, the named Plaintiffs and members of the Plaintiff class were city drivers employed at terminals at which road drivers were also employed. The "no-transfer" and seniority systems were found to be discriminatory because they denied to city drivers the right to transfer to the over-the-road classification within the same terminal. These decisions are based on an evidentiary

record that establishes that but for the company's discriminatory policies, some or all of the minority city drivers would have become road drivers at their respective terminals when they were initially employed.[4] In this case, the named Plaintiffs and many members of the class are employed at terminals which employ only city drivers. To have become road drivers, they would have had to apply at a geographically separated company terminal at which road drivers are employed. This local hire policy is applied to all similarly situated applicants whether minority or non-minority. Additionally, the company restrictions on the transfer of incumbent employees between terminals apply to all employees, regardless of race or national origin. Thus, the inference that city drivers at non-road domiciles would have become over-the-road drivers but

[4] On June 2, 1972, the U.S. Department of Justice brought suit against ETMF and two union co-defendants alleging that the parties were engaged in a pattern or practice of discrimination pursuant to § 706 of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-6. After extensive negotiations with the Department of Justice, ETMF entered into a consent decree which covered in part:

A. Such black or Spanish-surnamed city drivers, hostlers, checkers, and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been since July 2, 1965, domiciled under either ETMF or a predecessor company.

B. Such persons who are incumbent city employees at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road. *United States v. East Texas Motor Freight*, Civil No. 3-6025-B (N.D. Tex. Feb. 19, 1974).

Pursuant to the decree ETMF agreed to widespread changes in its hiring and employment procedures. Specifically transfer procedures were established whereby covered city drivers could

for the Petitioner's allegedly discriminatory policies, does not find experiential support in the precedent, and requires a factual assumption neither explored at trial nor within the proper scope of judicial notice. The rule was non-discriminatory on its face and was based on a concededly legitimate business judgment.

Each terminal manager is responsible for the profitability of his terminal. Therefore, he is given the authority to make the initial determination as to which person to hire. To allow drivers to transfer between terminals would impose upon a terminal manager the consequences of a hiring decision made by another. The autonomous terminal policy has never been found to be discriminatory. In fact, in the case below, the Fifth Circuit stated:

> "ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain road terminals is not discriminatory, and we leave those practices in tact." (Op. at 1286)

Plaintiff's theory of liability, then, challenged ETMF's policy of refusing to allow drivers, whether minority or non-minority, city or road, to transfer between *terminals* or to be hired at one terminal for employment at a second terminal. The Court of Appeals refused to recognize the novelty of this theory, but constantly compared ETMF's "no-transfer" between terminals rule to the "no-transfer" between classifications within a single terminal rule found discriminatory in other cases. *See* App. B. at ____ .

transfer to over-the-road positions, and ETMF agreed to provide a total of $175,000 as backpay compensation for members of the affected class nationwide. Thus, to the extent that ETMF has engaged in practices similar to those found to be discriminatory in the other cases, these practices have been discontinued and a remedy provided.

In order to find that ETMF's facially neutral "no transfer between terminals" policy was discriminatory, the Plaintiffs would have had to prove that the policy perpetuated the consequences of past discrimination. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In this instance, the Plaintiffs would have to prove that because of past discrimination, minority drivers were hired in city-driver-only terminals in disproportionate numbers. This question was not an issue in this litigation until it was implicitly decided by the Court of Appeals *sua sponte*[5] as a premise to its finding of class liability.

Defendant was never put on notice that its hiring and transfer policies, with respect to road drivers and city drivers at non-road domicile terminals, would be in issue, and was thus deprived of its opportunity to present evidence tending to rebut any inferences raised by the illusory statistics upon which the Court of Appeals relied in making this finding. Thus, the court's action is contrary to its own admonition in *Laird v. Air Carrier Engine Service, supra*, that if a court departs from the facts and issues stipulated prior to trial, it must see "that suitable, protective terms or conditions are imposed to prevent substantial and real harm to the adversary." *Id.* at 953.

The Court of Appeals' conscious disregard of the stipulations is indeed shocking. The parties had stipulated that the trial involved only liability to the individual Plaintiffs and yet the Court of Appeals, in certifying the litigation *sua sponte* as a Class action stated:

[5]The Fifth Circuit brushed aside the parties' stipulation which expressly excluded this issue, saying:

> "[W]e accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as city drivers." (Op. at 1272)

> "We have before us a record of proceedings, completed as a class action, and judge for ourselves the possible effects of any antagonism of interest. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirement of Rule 23(a) and established a proper class action under Fed. R. Civ. P. 23(b)(2)." App. b. at 24b. [6]

Having incorrectly assumed that the case was tried as a class action, the Court of Appeals said:

> "There is no serious dispute that the plaintiffs here have satisfied the requirements of Rule 23(a)." App. B. at 21b.

The reason there was no serious dispute is that these matters were never put into dispute. It is clear even from the truncated version of the exchange quoted by the court that both the parties and the judge understood that Defendant's potential liability to the Plaintiff class alleged in the complaint was not before the court at trial. Whether or not this decision was correct as a matter of federal procedure, it was the

[6]In support of its contention that the trial was completed as a class action, the court quoted out of context a colloquy between the trial judge and Plaintiffs' attorney (App. B at n. 14). A reading of the entire exchange indicates that neither the Defendant nor the trial judge considered the issues at trial to include the appropriateness of the class. In response to Defendant's objection that Plaintiff should have moved to establish a class action prior to trial, the trial judge said:

> "I agree. But just for this one witness, unless it gets too far out of hand, Mr. Weiss – he is also offering this witness for the limited purpose of showing the general company practice which would coincide and corroborate the testimony of the parties in the case. I am certainly going to allow it for that purpose and I will keep the question of the class open."

assumption that controlled the formation of the District Court trial. The Court of Appeals, thus, had no factual record upon which to make a *sua sponte* class action determination. The Court of Appeals, to the prejudice of Defendant Petitioners, arrogated to itself the function of the District Court to determine whether the class action is to be maintained. Had the District Court performed that function with a similar disregard for the absence of facts on record, the same Court of Appeals would undoubtedly have reversed the trial court's precipitous action.

Underlying these procedural irregularities are serious questions concerning the appropriateness and scope of the class and the adequacy of the named Plaintiffs as class representatives. As noted, *supra*, the theory of liability with regard to city drivers domiciled at city-only terminals varies greatly from that of city drivers based at road domicile terminals. Furthermore, city drivers at road-driver terminals may have a superior claim to available road jobs than the city drivers at non-road-driver terminals, such as named Plaintiffs. They manifested a willingness to locate in the vicinity of the road terminal from the outset and may possibly have been seeking employment as a road driver when offered the job as city driver. And yet, city drivers at non-road terminals will undoubtedly argue that they should be offered road jobs on the same basis as city drivers at road terminals. Thus, the claims of the named Plaintiffs are not typical of the claims of the members of the class as "certified" by the Fifth Circuit nor is it clear that they adequately represent the entire class. *See EEOC v. Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

The Court of Appeals' arbitrary and capricious determination of the class action issue deprived the Defendant of the opportunity to make arguments concerning the appropriateness and scope of the class and to introduce evidence supporting these arguments. Furthermore, the city drivers at road terminals are bound by the *res judicata* effect of the court's decision even though they may be prejudiced by the court's order requiring Defendant to consider city drivers from city terminals on the same qualification date basis.

The Court of Appeals' decision amounts to an imposition of potentially staggering liability on an employer merely because he has been sued by members of a minority group, and other employers in the same industry have been held liable in similar actions. Liability is based on the court's intuitive sense of discrimination in the air, unsupported by any evidence produced at trial, and on a theory never advanced by the Plaintiffs. Viewed either separately or cumulatively, these prejudicial deficiencies in the appellate process warrant review by the Court.

The Court has traditionally granted *certiorari* in order to exercise its supervisory power over the Courts of Appeals to insure that due process and the fair administration of justice are maintained. *See Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 21 (1963); *Elkins v. United States*, 364 U.S. 206, 216 (1960); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40, 41 (1950); *Walling v. Reuter Co.*, 321 U.S. 671, 676, 677 (1944); *United States v. Hamburg-American S.S. Co.*, 239 U.S. 466, 477 (1916); *see also Haynes v. United States*, 390 U.S. 85, 101 (1968); *Neely v. Eby Construction Co.*, 386 U.S. 317, 321, 322 (1967). It is

appropriate for the Court to do so in this instance where the Court of Appeals consciously and cavalierly violated the same due process protections which it is mandated by the Constitution to protect.

II.

THE COURT OF APPEALS' DECISION DISREGARDS RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND HOLDS, IN EFFECT, THAT A CLASS ACTION IS APPROPRIATE IN VIRTUALLY EVERY TITLE VII ACTION.

Although the Court of Appeals alluded to the well-settled rule that a Plaintiff in a class action must bear the burden of proving that action meets the requirements of Rule 23(a) and (b), *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974), the court in effect decided that a class action was appropriate even though no showing was made as to any of the elements of Rule 23.

In finding that the case was an appropriate class action, the Court of Appeals gave short shrift to the requirements of Rule 23(a), saying:

> "There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical." (App. B at 21b.)

The reason that there was "no serious dispute" is that these matters were never put into dispute by the

Plaintiff or by the independent motion of the District Court judge. In fact, no evidence at all was ever directed to the questions of numerosity, typicality, and commonality of issues (*see* discussion pp. 19-21, *supra*). The Court of Appeals limited its own inquiry to the requirement of Rule 23(a)(4): that the representative, fairly and adequately, protect the interest of the class. After determining that the Plaintiffs' theory of recovery was not antagonistic to theories which may be profferred by members of the purported class, the Court of Appeals, by some unarticulated, quantum leap of reasoning, decided that the Plaintiffs would fairly and adequately represent the class.[7] The Court gave no consideration at all to the requirements of Rule 23(b), but stated simply that the action met the requirements of Rule 23(b)(2).

In justification for this disregard of Rule 23, the Court said:

> "[T]he requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981 (cite omitted). Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong . . . . And a suit charging employment discrimination is naturally 'a sort of class action for fellow employees similarly situated' (cite omitted). When class relief is sought in the complaint, therefore, the court should liberally apply the requirements of Rule 23(a)." (App. B at 21b)

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[7] Actually, there may indeed be an adversity of interest between the named Plaintiffs and some members of the class. *See p. 20 supra.*

Petitioner recognizes that some commentators have advocated that the requirements of Rule 23(a) be liberalized in actions alleging civil rights violations. *See* Wright and Miller, *Federal Practice and Procedure*, §1771; *Developments in the Law – Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1219-21 (1971). Whether or not the limitations of Rule 23 should be strictly applied in Title VII actions is a matter of some dispute. The better view appears to be that nothing in Title VII or Rule 23 warrants a liberalization. *Taylor v. Safeway Stores, Inc.*, ____ F.2d ____, 11 F.E.P. 449, 459 (10th Cir. Oct. 3, 1975); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., concurring); *Kinsey v. Legg Mason & Co.*, 60 F.R.D. 91 (D.D.C. 1973) (Gasch, J.) (mem.); *Gresham v. Ford Motor Co.*, 53 F.R.D. 105, 106-07 (N.D. Ga. 1970); *Mason v. Calgon Corp.*, 63 F.R.D. 98 (W.D. Pa. 1974).

However, the Court of Appeals' decision goes far beyond any of the previous decisions adopting the liberalized view. *See EEOC v. Detroit Edison Co., supra*, at 311 (adopting liberalized view, yet narrowing class on the basis of Rule 23(a)). Although the Court of Appeals alluded to Rule 23(a), it certified the class as alleged even though no evidence appeared in the record which would form the basis for the requisite findings and even a rudimentary analysis of the claims of the class exposed the divergence of theories and premises among the various class members.

The policy reasons asserted by the Court for its disregard of Rule 23 – the broad protective and remedial nature of Title VII – would seem to apply

with equal force to class actions brought under the Securities and Exchange Acts. And yet, the Court recently rejected these arguments in *Eisen v. Carlisle & Jacquelin, supra*, and held that the requirements of Rule 23(c)(2) cannot be avoided even when the Plaintiff's action would be effectively ended because of the tremendous cost involved. Here, there is no allegation that Plaintiff's individual action will be defeated, but class relief must merely await an appropriate case.

If the Fifth Circuit's decision is allowed to stand, the courts will be inundated by class actions under Title VII which should, in reality, be individual actions. In many cases, this will result in prejudice to the Defendants who must defend against a morass of claims, and inconvenience to the District Court which must administer this diffuse litigation in a manner that preserves the parties' due process rights.

Without the restraining influence of Rule 23, courts will be required to determine broad and complex issues of fact and law on the basis of the often meager facts presented by individual Plaintiffs. Not only will this result in injustice to Defendants, but to unwitting members of the class joined without their knowledge or consent under Rule 23(b)(2) and bound by the *res judicata* effect of an adverse judgment or an inartfully drawn remedy. *See Johnson v. Georgia Highway, supra*, at 1126-27 (Godbold, J., concurring).

The Court should accept *certiorari* in order to define and delimit the application of Rule 23 to actions brought under Title VII of the Civil Rights Act and to extinguish the precedent established by the Court's decision below that the prerequisites of Rule 23 do not create meaningful standards for Title VII class actions.

III.

THE COURT OF APPEALS ERRONEOUSLY HELD THAT PLAINTIFFS IN A CLASS ACTION UNDER TITLE VII OF CIVIL RIGHTS ACT NEED SHOW ONLY A STATISTICAL IMBALANCE IN DEFENDANT'S WORK FORCE TO ESTABLISH A *PRIMA FACIE* CASE OF RACIAL DISCRIMINATION, WHICH HOLDING IS INCONSISTENT WITH THE COURT'S DECISIONS IN *McDONNELL DOUGLAS CORP. V. GREEN*, 411 U.S. 792 (1973), AND *GRIGGS V. DUKE POWER CO.*, 401 U.S. 424 (1971).

Relying on the stipulation that until 1970, East Texas Motor Freight had not employed black or Mexican-American line drivers in the portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement, the Fifth Circuit concluded that the Plaintiffs had established a *prima facie* case of discrimination with respect to the Plaintiff class. In support of this finding, the Fifth Circuit cited its decision in *United States v. Hayes International Corp.*, 456 F.2d 112, 120 (5th Cir. 1972), in which the Court found that the gross disparity in the hiring of office and clerical employees by Hayes established a *prima facie* case of discrimination. In addition, the court cited several cases involving the trucking industry in which the Plaintiffs have relied in part upon statistical evidence to establish a *prima facie* case. *See* Appendix B at 28b & note 17. However, the Court of Appeals ignored the distinction between this case and those upon which it relied. In this case, the Plaintiffs' theory required that they establish that

Defendants discriminated by hiring minorities in disproportionate numbers in city-driver terminals. Absent this showing ETMF's facially neutral rule against transfer between terminals does not have a disparate impact on the Plaintiff's class. See discussion pp. 17-18 *supra*. The statistics relied upon by the court relate only to hiring at road domicile terminals. Thus, the requisite nexus between the statistics and the Plaintiffs' theory of liability which was present in the other cases is lacking here.

The Court has never considered the question of the quantity and the quality of statistical evidence necessary to prove a *prima facie* case of racial discrimination. Like any other Plaintiff, the Plaintiff in a class action, brought under Title VII of the Civil Rights Act, bears the burden of proving his case by a preponderance of the evidence. *See Albermarle Paper Co. v. Moody*, ____ U.S. ____, 45 L. Ed. 2d 280, 301 (1975), citing *McDonnell Douglas Corp. v. Green, supra*. Recently, it has become the rule, rather than the exception, for class representatives to rely almost solely on statistical evidence to establish their *prima facie* case. *See*, e.g., *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, *rehearing denied*, 494 F.2d 1296 (5th Cir. 1974); *Bing v. Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970). However, the quantity and the quality of the statistical evidence submitted in these cases varies greatly. *Compare Stamps v. Detroit Edison Co.*, 365 F.Supp. 87 (E.D. Mich. 1973), reversed and remanded on another issue, 515 F.2d 301 (6th Cir. 1975) (Detailed statistical evidence regarding the number of persons hired compared with

the number of applicants and minority concentration in the metropolitan area), with *Rodriguez, supra* (Unexplained, unamplified stipulation as to the racial ethnic profile of job classification).

A statistical disparity in racial or ethnic profiles may result from any number of causes, even in a truly random selection procedure. Courts must be very careful in scrutinizing such evidence to determine whether the inference may be properly drawn that the imbalance resulted from a discriminatory hiring practice. Indeed, the Fifth Circuit itself recognized the unreliability of bald statistics in *Ochoa v. Monsanto Co.*, 5 E.P.D. ¶8437 (5th Cir. 1973) (Court not compelled to find *prima facie* case of discrimination when small universe involved). *See, also, Lewis v. Pennsylvania Industrial Development Authority*, 371 F.Supp. 877, 884-85 (E.D. Pa. 1974).

Commentators have expressed concern over the lack of sophistication of both courts and attorneys in dealing with statistical evidence. Most commentators believe that although statistics may be sufficient to raise an inference of racial discrimination, that inference ordinarily should be supported by more traditional evidence. *See*, e.g., Fiss, *A Theory of Fair Employment Laws*, 38 U. Chi. L. Rev. 235, 270-72 (1971); Bogen and Falcon, *The Use of Racial Statistics in Fair Housing Cases*, 34 Md. L. Rev. 59, 80 & N.54 (1974); Finklestein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 Harv. L. Rev. 338, 340-49 (1966); *See generally*, Tribe, *Trial by Mathematics; Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329 (1971).

The mere showing of a statistical disparity without more can hardly be sufficient to establish liability by a

preponderance of the evidence, *see Alexander v. Louisiana*, 405 U.S. 625, 630 (1972) (factual inquiry is necessary to take into account all possible explanatory factors). In a class action under Title VII, the class representative must at least be required to show that such a disparity would be improbable in a non-discriminatory selection process and that qualified minorities were seeking employment in the relevant geographical area. *See Lewis v. Pennsylvania Industrial Development Authority, supra;* c.f. *Alexander v. Louisiana, supra* (Court rests finding on statistical disparity, plus opportunity to discriminate).

The necessity of proving the existence of qualified members of the Plaintiff class is also required by the court's decision in *Griggs v. Duke Power Co., supra*, and *McDonnell Douglas Corp. v. Green, supra.* In *Griggs*, the Court said:

> "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436.

In *McDonnell Douglas*, the Court recognized the need for an individual Plaintiff to prove that he was qualified for the job which he was seeking. *McDonnell Douglas Corp v. Green, supra*, at 802. To hold that the class representative need not prove that there are members of the class who are qualified would place the Defendant in the anomalous position of being held liable for the fact that threre are no qualified persons in the class

even though he is under no duty to hire an unqualified person. *See United States v. Central Motor Lines, Inc.*, 338 F.Supp. 532, 559 (W.D. N.C. 1971); *Dobbins v. Local 212, International Bro of Elec. Wkrs.*, 292 F.Supp. 413, 446 (S.D. Ohio 1968).

Although mere statistics may be probative of discrimination in hiring into unskilled, entry level jobs as in *United States v. Hayes International Corp., supra*, they clearly cannot constitute a *prima facie* case of discrimination where, as here, considerations of public safety demand that incumbents be highly qualified. Most often the statistical evidence submitted by Plaintiffs in Title VII cases consist of data compiled by the employer and submitted to EEOC in accordance with Title VII. Thus, the Plaintiff's burden consists merely of requesting this data in discovery. At very least, he should be required to explain the statistical significance of such data. To place the burden on the Defendant puts him in the impossible position of proving a negative – that no qualified member of the class was seeking employment (see App. B. at 31b).

In light of the growing reliance on statistical evidence to prove liability in civil rights cases and the explosion of complex, complicated class actions in this area, the Court should grant the Petition herein and articulate the burden of proof required by a class action Plaintiff, both in terms of the quantity and quality of statistical evidence necessary to produce an inference of discrimination and the additional evidence required to support that inference sufficiently to establish a *prima facie* case.

CONCLUSION

For these various reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESSE RODRIGUEZ, ET AL.)
)
V.)
CIVIL ACTION NO. SA-71-CA-302
EAST TEXAS MOTOR FREIGHT,)
ET AL.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 29th day of January, 1973, came on to be heard the above entitled and numbered cause for trial on the merits, and both parties appeared in person and by their Attorneys of Record and announced ready for trial, whereupon the Court proceeded to hear the evidence from the witnesses and oral arguments of counsel and at the conclusion of the trial and after consideration of all the pleadings, the evidence adduced by both parties, the arguments of counsel and applicable law, the Court hereby makes its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This Court has jurisdiction of this action by virtue of Title 42, U.S.C., Section 2000 e-5(f) and Title 28,

U.S.C., Section 1343 (4) providing a cause of action under Title 42, U.S.C., Section 1981.

2. The plaintiffs are employees of the defendant truck line and members of the defendant Union and its affiliates (Local 657 of the Southern Conference of Teamsters and the International Conference of Teamsters), with the exception of the plaintiff, Jesse Rodriguez, who is no longer an employee of the defendant truck line. Plaintiffs are all Mexican-American residents of the United States and residents of San Antonio, Bexar County, Texas. The defendant truck line is a corporation doing business in the State of Texas and the City of San Antonio and operates and maintains a local city-wide freight terminal and a city-wide trucking service in San Antonio, Bexar County, Texas and is an employer within the meaning of Title 42, U.S.C., Section 2000 e-(b). The defendant Union and its affiliates are the representatives and bargaining agents of the plaintiff employees on an international, regional and local basis.

3. All plaintiffs were hired by the defendant truck line as regular city pick-up and delivery drivers on the dates set out herein and have remained in that capacity to the present time.

Jesse Rodriguez	-	Sept., 1965
Modesto Herrera	-	May, 1965
Sadrach Perez	-	May, 1959

4. It is stipulated that none of the plaintiff employees were discriminated against as to their original employment.

5. Except for one road driver employed by the Valley Copperstate Sunset Lines, who was transferred

from San Antonio, Texas immediately after the merger in 1970 with East Texas Motor Freight, the defendant truck line has never had any road drivers domiciled in San Antonio, Bexar County, Texas and the San Antonio terminal is operated solely as a local, city-wide pick-up and delivery service.

6. It is stipulated that prior to and subsequent to the effective date of Title VII of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed a charge of discrimination with the Equal Employment Opportunity Commission (E.E.O.C.) the defendant truck line had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

7. It is stipulated that except for having been received and filed locally by the Terminal Manager Sager in August 1970, the defendant truck line has never considered the written applications for employment as road drivers of the plaintiffs. Such applications were transmitted to the Dallas corporate office of the defendant truck line subsequent to the filing of the E.E.O.C. charges involved herein.

8. It is stipulated that the claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of city driver and have been denied a job as road driver because:

(a) of the maintenance of separate seniority rosters for city and road drivers;

(b) of the fact that any city driver, regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) the defendant truck line discouraged inquiries from the plaintiffs concerning the qualifications and/or availability of road driver jobs;

(d) the defendant truck line had always employed Anglo/white applicants as road drivers; and

(e) the defendant truck line's policy and practice has been based to a great extent on a word of mouth system. Since the defendant truck line's road drivers and supervisory and terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers.

9. It is further stipulated that the only issue presently before the Court pertaining to the defendant truck line is whether or not its failure to consider the plaintiffs' road driver applications constituted a violation of Title VII and 42 U.S.C., Section 1981.

10. On April 1, 1970 the defendant truck line and the defendant Union entered into the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick-up and Delivery Supplemental Agreement (hereinafter referred to as "Union Contract") which expires June 30, 1973 and the terms and conditions of which are fully known and understood by the plaintiff employees. The plaintiff employees have ratified this contract and prior similar contracts since the time of their employment, with the exception of Jesse Rodriguez who voted against ratification of the current contract solely because of the strike and lock-out by the Chicago bargaining unit in the Spring of 1970 and not due to any contract clause made the subject of this suit.

11. The provisions of the Union Contract providing for job transfer from a city driver to a road driver and

vice versa, including the provision for separate seniority lists for city and line drivers, apply to all job applicants and employees regardless of race or qualifications, and are not in any way discriminatory.

12. The defendant truck line's policy and regulations regarding job transfers are generally:

(a) The applicant must relinquish his current position;

(b) The applicant must make written application for a new position at terminal location where the job is sought;

(c) The applicant must be willing to re-locate at the new terminal location;

(d) For a road driver job, applicants must pass certain standardized Department of Transportation tests and company tests (driving and physical); and

(e) The applicants must have certain road driving experience.

These regulations are not unreasonable and apply to all job applicants and employees regardless of race or qualifications. It is stipulated that the standards and qualifications of the defendant truck line for its road drivers are not discriminatory. The fact that each terminal is autonomous as concerns the employment of drivers is proper and in accordance with accepted business practices.

13. The plaintiff employees testified that they were unwilling or at least ambivalent to comply with the job transfer requirements even when confronted with a hypothetical opportunity to make the job change under the existing regulations "tomorrow" assuming a position was available. Thus, plaintiffs' objections are not grounded on lack of job availability, but rather on the stringency of the regulations.

14. There has been no showing of discrimination as regards the hiring practices of the San Antonio Terminal office of the defendant truck line.

15. The plaintiff employees have never filed a discrimination grievance charging a violation under Article 38 of the Union Contract, but originally filed a Complaint with the Equal Employment Opportunity Commission.

16. The plaintiff employees have never availed themselves of participating in the contract amendment negotiation meetings at the local Union level in an effort to change the job transfer requirements.

17. The plaintiff employees have not been discriminated against by their Union. The Union is comprised of a majority of Mexican-Americans and Negroes and every member is free to participate in the contract negotiating process and to vote on every issue or contract presented to the membership.

18. When the plaintiff employees inquired from various supervisory personnel at the San Antonio Terminal as to the method of securing a road driving position, they were not discouraged nor misled, but rather the requirements were explained (i.e. they would have to make application at the road driving terminal location, etc.). The failure of the plaintiff employees to secure a road driving position was due to an unwillingness to give up their city driving seniority and an inability to meet the job qualifications rather than actual racial discrimination by either the defendant truck line or the defendant Union.

19. In January, 1972, the company made the following modification in its no-transfer policy: during a period of 30 days at any terminal where line drivers were domiciled, a city driver could make application for

transfer to a line driver's job. He would be given the necessary tests and if he qualified, as a road driver job opened up or became available, he would be permitted to take the job. In effect, the requirement of three years immediate prior line haul road experience was temporarily waived as to such city drivers.

In the area covered by the Southern Conference of Teamsters, there were 202 applications by city drivers. Some of them failed to qualify or to pass the required tests. Some qualified, but did not like over-the-road driving and voluntarily went back to city driving. In the end, only five city drivers successfully made the transition or transfer to over-the-road drivers' jobs. All five of these worked out of the Memphis, Tennessee terminal.

20. The plaintiff, Jessee Rodriguez, continues in his employment with the defendant truck line as a city driver. His driving and work record includes numerous accidents (at least three) and at least five injuries.

21. The plaintiff, Modesto Herrera, continues in his employment with the defendant truck line as a city driver. His driving and work record includes at least three accidents, at least seven injuries, much time off because of injuries, and at least four warning letters, three of which involved abnormally low productivity.

22. The plaintiff, Sadrach G. Perez, was employed by the defendant truck line as a city driver until his discharge for cause on May 18, 1971. His driving and work record included the following:

(1) On January 18, 1966 he claimed to have been totally and permanently disabled in an accident in which he hurt his back stacking boxes. In June of 1966 he filed suit in the District Court of Bexar County, Texas, appealing from an award of the Industrial

Accident Board and alleging that he was "totally and permanently incapacitated". On July 27, 1966 this suit was voluntarily dismissed. There was no settlement with or payment by ETMF's compensation carrier.

(2) On October 22, 1970 Sadrach G. Perez was given a warning letter by the then terminal manager for violating instructions and a long-standing policy of the terminal.

(3) On January 28, 1971 Perez was dispatched with a shipment to Lackland Air Force Base. The shipment included 471 pieces, totaling 5,133 lbs., with most of the pieces weighing around 11 lbs. and no piece weighing more than 25 lbs.

He complained to the Assistant Terminal Manager Ezra Beierle that the truck in which the merchandise was loaded did not have a lift gate and wanted to unload the merchandise onto a truck that did have a lift gate. Beierle refused, telling him to proceed with the delivery.

Perez then went to the office of Terminal Manager Asbury and demanded that the truck be unloaded and the merchandise loaded onto one having a lift gate. The argument consumed about 20 minutes. Asbury told him to proceed with the delivery. Perez left with the statement, "I've been too good too long."

He proceeded to Lackland where he took a total of five hours to deliver 5,133 lbs. at one location.

He was given a written reprimand and warning because of the incident.

(4) A few days later, he filed a Workmen's Compensation claim asserting that on the Lackland delivery on January 28, 1971 he

injured his left shoulder and upper back and neck.

(5) On January 29, 1971 he was given a written warning notice because of partial absences from work on January 26, 27 and 28.

(6) On March 26, 1971 he was given a warning notice because of his failure to make a delivery on March 24, 1971 at Solo Serve, the warning notice citing other instances in February, 1971 of poor production by him.

(7) On March 26, 1971 he was given a warning notice in connection with a delivery at Sonney Plumbing and Air Conditioning Company. He had unloaded the merchandise on the ground. When the lady in charge, Mrs. Mary Fewell, asked him to place it on the dock, he refused, claiming that the stacking of the merchandise on the ground completed the delivery. Mrs. Fewell wrote a letter to the company protesting the fact that Perez was disrespectful and discourteous to her.

(8) On May 18, 1971 Perez was dispatched with a load of drugs to the Scobey Warehouse. The boxes had been segregated by numbers in the trailer at the point of origin (Chicago). The instructions to Perez were that he was to load them on pallets at the Scobey Warehouse according to the instructions.

Perez became involved in an argument with the Scobey supervisor about how the pallets were to be delivered to him. Assistant Manager Beierle made a trip to Scobey's to attempt to solve the problems which Perez had created.

Terminal Manager Asbury and Beierle made another trip to Scobey's attempting to solve the problems.

Finally, about 2:45 P.M., Asbury received a call from Chicago in which the shipper complained about the way its merchandise was being handled at Scobey's, Scobey's having apparently reported to the shipper. Perez was ordered to lock the trailer and return to the terminal, where he was discharged by Asbury.

(9) Local Union No. 657 filed a grievance in connection with the discharge which eventually reached arbitration and was heard by the Joint Committee at a meeting in Biloxi, Mississippi. After a full hearing, the committee decided in favor of the company and against Perez (and the Union). At the hearing, evidence was introduced that more than ten (10) customers of the company had given instructions not to send Sadrach Perez back to their places of business, stating that they would refuse the freight if it was to be delivered and would not give up freight if he was to pick it up.

(10) On July 19, 1971 Perez filed a charge with the National Labor Relations Board against the International Brotherhood of Teamsters alleging a violation of the act in its failure to properly represent him. The Regional Director declined to issue a complaint. Perez appealed to the General Counsel who denied the appeal. Represented by counsel, Perez has a current claim pending before the Industrial Accident Board arising out the 1971 alleged accident in which he claims that he is totally and permanently disabled, claiming to have a bad back.

23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according

to the company manual due to age or weight or driving record. The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.

24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.

25. Both the defendant truck line and the Union defendants are bound by the contracts in that neither can unilaterally change the contract provisions by allowing a merger of seniority lists, a transfer of seniority or in any other manner attempting to alter, combine or discard the provisions of the separate contracts for city and road drivers without subjecting themselves to economic or other negative sanctions by the non-offending party.

26. Refusal by the defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union Contract and in no manner causes, perpetuates or results in discriminatory practices by any of the defendants.

27. The fact that there are separate Union Contracts and job qualifications for city and road drivers is reasonable both as an accepted business practice and by the fact that the National Labor Relations Board recognizes the two job groups as separate bargaining units.

28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a Complaint with the Equal Employment Opportunity Commission, or for any other reason.

29. The defendant truck line and Union did not discriminate against the plaintiff employees because they made a charge or indicated they would make a charge against the defendants to the Equal Employment Opportunity Commission.

30. The defendants did not discriminate against the plaintiffs or any other employee or Union member on the basis of race or otherwise.

31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.

32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' applications for employment as road drivers.

33. While not compelling, further evidence of a continuing desire of the majority of the local Union membership is contained in the Affidavit of R. C. Shafer, President and Business Manager of the local Union, and George Hardeman, Jr., Recording Secretary of the local Union, filed February 23, 1973. The parties have stipulated that, if called, these two men would

testify that at the Union Membership meeting on February 11, 1973, after the trial of this case was completed, the employees of the defendant truck line, and others, rejected proposals that the next City and road driver contracts to be merged and that both job classifications be permitted to transfer to the other with company seniority for all purposes. A further proposal to the effect that the seniority of the employees working for the truck lines remain as it is in the current contracts was approved by a vote in excess of two to one.

CONCLUSIONS OF LAW

1. I conclude as a matter of law that none of the defendants violated Title 42, United States Code, Section 2000e-5 or any section of Title 42 relating to race discrimination.

2. I further conclude that this cause of action is not a proper one for class action and that, therefore, the class action claims in the Complaint should be, and the same are hereby, DISMISSED.

3. I further conclude as a matter of law that the plaintiffs, and each of them, take nothing by reason of their suit and that the defendants and each of them are entitled to judgment.

4. I further conclude that the defendants, and each of them, recover their court costs incurred herein against the plaintiffs.

ENTERED this 22nd day of March, 1973, at San Antonio, Texas.

/s/John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGE

A true copy of the original, I certify.

DAN W. BENEDICT, Clerk
BY: /s/Frances Mailey
Deputy.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESSE RODRIGUEZ, ET AL.	)	
	)	
V.	)	CIVIL ACTION NO.
	)	SA-71-CA-302
EAST TEXAS MOTOR FREIGHT, ET AL.	)	

JUDGMENT

On the 29th day of January, 1973, this action came on for trial before the Court, the Honorable John H. Wood, Jr., United States District Judge presiding, and

the issues having been duly tried and heard and the Court, having made Findings of Fact and Conclusions of Law, is of the opinion that Judgment should be entered for the defendants.

It is, therefore, ORDERED, ADJUDGED AND DECREED that the plaintiffs take nothing by reason of their suit, that the action be dismissed on the merits, and that the defendants, and each of them, recover their Court costs incurred herein against the plaintiffs.

ENTERED this the 22nd day of March, 1973, at San Antonio, Texas.

/s/ John H. Wood, Jr.
JOHN H. WOOD, JR.
UNITED STATES DISTRICT JUDGI

A true copy of the original, I certify.

DAN W. BENEDICT, CLERK
BY: /s/ Frances Mailey
Deputy.

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JESSE RODRIGUEZ, ET AL.,)
)
Plaintiffs)
CIVIL ACTION NO. SA-71-CA-302
VS.)
)
EAST TEXAS MOTOR FREIGHT,)
ET AL.,)
)
Defendants)

ORDER

On this the 6th day of April, 1973 came on to be heard Plaintiffs' Motion to Amend Findings of Fact and Conclusions of Law in the above entitled cause. The Court having duly considered the same, makes the following order:

1. Paragraph 2 of this Court's Findings of Fact and Conclusions of Law is amended to put the name Sadrach G. Perez instead of Jesse Rodriguez.

2. The motion to amend Paragraph 4 of the Court's Findings is overruled.

DONE on this the 6th day of April, 1973.

/s/ John H. Wood, Jr.
U. S. District Judge

A true copy of the original, I certify.

DAN W. BENEDICT, CLERK
BY: /s/ Francis Mailey

APPENDIX B

Jesse RODRIGUEZ, Sadrach G. Perez and Modesto Herrera, on their own behalf and on behalf of those similarly situated, Plaintiffs-Appellants,

v.

EAST TEXAS MOTOR FREIGHT, Southern Conference of Teamsters and Teamsters Local 657, Defendants-Appellees.

No. 73-2801.

United States Court of Appeals, Fifth Circuit.

Nov. 25, 1974.

Mexican-American city truck drivers brought employment discrimination class action against motor carrier and union organizations challenging carrier's requirement that city drivers resign their jobs before applying for more lucrative road positions and rule preventing city drivers from carrying their seniority to road jobs. The United States District Court for the Western District of Texas, John H. Wood, Jr., J., found that class action was inappropriate and that defendants had not violated civil rights statutes and the plaintiffs appealed. The Court of Appeals, Wisdom, Circuit Judge, held that plaintiffs met class action requirements and could maintain action on behalf of carrier's Mexican-American and Negro city drivers who were included in collective bargaining agreement; that evidence that discrimination had been practiced in the past in hiring of road drivers, that "no transfer" policy and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity precluding hiring of city drivers for road driver positions established that carrier had discriminated against plaintiffs and the plaintiff class; and that participation by union organizations in establishment

Synopses, Syllabi and Key Number Classification
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of separate seniority rosters constituted violation of civil rights statutes.

Reversed and remanded.

1. Federal Civil Procedure ⇐161

Class action may not be dismissed because class representatives fail to ask for ruling on propriety of class nature of suit; responsibility for determining propriety of class nature of suit falls to trial court. Fed.Rules Civ.Proc. rule 23(c)(1), 28 U.S.C.A.

2. Federal Civil Procedure ⇐181

Plaintiff class representatives who instituted employment discrimination action were required to establish that the action met requirements of class action rule. Fed.Rules Civ. Proc. rule 23(a), 28 U.S.C.A.

3. Federal Civil Procedure ⇐181

Requirements of class action rule must be read liberally in suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4. Federal Civil Procedure ⇐184

Suits brought under equal employment opportunity provisions and equal rights provision of civil rights statutes are inherently class suits. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

5. Federal Civil Procedure ⇐184

Discrimination on the basis of race or national origin is a class wrong. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

6. Federal Civil Procedure ⇐184

Antagonism between Mexican-American city truck drivers, who instituted employment discrimination action chal-

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lenging policy precluding transfer of city drivers to road driver jobs, and majority of membership of local union with respect to whether separate seniority lists of city and road drivers should be merged did not indicate antagonism with regard to contention that motor carrier and union organizations had discriminatorily excluded minorities from road driver positions and did not preclude maintenance of the action as a class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

7. Federal Civil Procedure ⇐1741

In order to remove possible antagonism between class representatives who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to more lucrative road driver jobs and some city drivers, trial court could have narrowed class or separated it into subclasses for purposes of relief or could have shaped relief to avoid any injustice to dissenting class members and, therefore, antagonism did not require dismissal of class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

8. Civil Rights ⇐46

District courts have wide discretion in fashioning relief under equal employment opportunity provisions of Civil Rights Act. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

9. Civil Rights ⇐46

Flexibility and careful tailoring of judicial decrees in actions brought under equal employment opportunity provisions of Civil Rights Act are the order of the day. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

10. Federal Civil Procedure ⇐181

Plaintiffs who instituted employment discrimination action were not required to present more than prima facie case

of discrimination against class in order to maintain action as class action. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

11. Stipulations ⇐14(4)

Plaintiffs who instituted employment discrimination action challenging motor carrier's policy precluding transfer of city drivers to road driver positions did not abandon their class claims by stipulating that the only issue before the court pertaining to the carrier was whether carrier's failure to consider the city drivers' applications for road driver positions constituted violation of civil rights provisions, as stipulation was apparently made in an attempt to eliminate confusion in exposition of evidence and not to foreclose class issues, plaintiffs continued to proceed as in a class action and such was made clear to trial court and defendants. Fed.Rules Civ.Proc. rule 23(a), 28 U.S.C.A.; 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

12. Federal Civil Procedure ⇐1741

Dismissal of employment discrimination action on behalf of class consisting of all Mexican-American and black applicants for road driver positions with motor carrier was not improper as plaintiffs never pursued action on behalf of those individuals; class considered for relief would be defined as all of carrier's Mexican-American and black city drivers who were included in collective bargaining agreement and who were precluded by carrier's policy from transferring to more lucrative road positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.; Fed.Rules Civ.Proc. rules 23, 23(a), (c)(1), 28 U.S.C.A.

13. Civil Rights ⇐44(1)

Prima facie case of employment discrimination may be established by statistical evidence and statistical evidence alone. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

14. Civil Rights ⇐44(1)

Evidence that motor carrier had never employed a Negro or Mexican-American as a road driver in portion of state covered by collective bargaining agreement prior to filing of employment discrimination charge, that two and one-half years later carrier had hired three Mexican-Americans to join its road driver force of approximately 180 drivers and that carrier had never hired a Negro road driver in the state established prima facie case of past discrimination in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

15. Civil Rights ⇐43

Once plaintiffs who instituted employment discrimination action established prima facie case of past discrimination in hiring, burden fell to defendants to rebut statistics or to explain disparity in hiring. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

16. Civil Rights ⇐39

Employer's present hiring practices could neither explain nor justify employer's past discriminatory hiring practices. 42 U.S.C.A. § 1981, Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

17. Civil Rights ⇐43

Absent proof to the contrary, it would be assumed that "lily white"/Anglo nature of motor carrier's road driver force until filing of employment discrimination charge with Equal Employment Opportunity Commission resulted from discriminatory hiring practices. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

18. Stipulations ⇐14(10)

Stipulation that plaintiffs had not been discriminated against when they were hired at trucking terminal as city drivers did not preclude determination that motor carrier engaged in discriminatory practices in hiring drivers for road

positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

19. Civil Rights ⇐44(1)

Proof that relevant labor pool lacks qualified minority persons may, even in a class action, rebut prima facie case of hiring discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

20. Civil Rights ⇐9.10

Equal employment opportunity provisions of Civil Rights Act do not force employers to hire unqualified applicants of any race or ethnic background. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

21. Civil Rights ⇐43

Motor carrier against which minority city truck drivers brought employment discrimination action challenging carrier's policy precluding transfer of city drivers to road driver positions had burden of showing that carrier's history of hiring only white/Anglo road drivers resulted from scarcity of available minority persons qualified to serve in position of road driver. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

22. Civil Rights ⇐44(1, 4)

Evidence that motor carrier had discriminated in the past in hiring road drivers, that carrier's policy precluding transfer of city drivers to road driver positions and maintenance of separate seniority rosters for city and road drivers perpetuated the past discrimination and that there was no business necessity for carrier's "no-transfer" policy and seniority system established that carrier had violated equal employment opportunity provisions of Civil Rights Act. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

23. Civil Rights ⇐9.10

To justify policy which perpetuates past discriminatory hiring practices on ground of business necessity, business

purpose of the policy must be sufficiently compelling to override any racial impact, it must effectively and efficiently carry out its business purpose and there must be no acceptable alternative practice. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

24. Civil Rights ⇐9.10

Motor carrier's "no-transfer" policy which precluded transfer by city drivers to more lucrative road driver positions and which perpetuated past discrimination in hiring of road drivers could not be justified under business necessity theory on grounds that policy was necessary to protect employees, property and the general public from unqualified drivers or on ground that majority of blacks and Mexican-Americans of union local comprised of city drivers had rejected proposal to merge city and road seniority rosters and that if it had taken action to merge seniority lines, carrier might have been subject to legal action by those who desired dual lists. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

25. Civil Rights ⇐43

Plaintiffs who brought employment discrimination class action challenging motor carrier's policy which precluded transfer by city drivers to more lucrative road driver positions were not required to prove that class, which was composed of city drivers, contained those qualified to assume road driver responsibilities; carrier had burden of proving that none of the class was qualified to transfer to road driver positions. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

26. Civil Rights ⇐9.10

It is discriminatory to require experience as a prerequisite to employment when experience is unavailable to minority persons. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

27. Stipulations ⇐14(10)

Stipulation that motor carrier's standards and qualifications for its road drivers were not discriminatory did not constitute waiver of contention, asserted in employment discrimination action brought by minority city drivers who were precluded by carrier's policy from transferring to more lucrative road driver positions, that road driving requirements, including requirement of three years' prior experience as a road driver had a disparate impact and discriminatory effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

28. Civil Rights ⇐9.11

Discrimination against black and Mexican-American city truck drivers resulting from motor carrier's policy precluding transfer by city drivers to more lucrative road driver positions from which minorities had been excluded in the past was continued and reinforced by union action which resulted in city and road drivers being placed in separate bargaining units with seniorities running from date of entry into the particular unit and, therefore, union organizations were liable for employment discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

29. Civil Rights ⇐43

Prima facie case of past hiring discrimination and proof that seniority system which was creature of collective bargaining agreement transmitted discrimination into the present shifted burden to union organizations to show that present discriminatory effects were unavoidable and required by business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

30. Civil Rights ⇐9.11

Union organizations could have eliminated "lock-in" effect of separate seniority rosters for city and road truck drivers without merging rosters and jeopardizing seniority rights of city drivers who wished to remain in their positions by allowing seniority carryover on a one-time-only basis for

qualified city drivers who wished to transfer to more lucrative road driver positions; thus, union organizations could not escape liability for present discriminatory employment effects of past exclusion of minorities from road driver positions on ground that the discriminatory effects were unavoidable and required as a business necessity. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

31. Civil Rights ⇐16

District courts have broad remedial powers to eliminate present effects of past employment discrimination and a large measure of discretion in modeling a decree. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Civil Rights ⇐9.10

Those who suffer employment discrimination must be permitted to take their rightful place when job openings develop. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

32. Civil Rights ⇐46

Black and Mexican-American city truck drivers, many of whom could have been road drivers but for discrimination with respect to hiring of road drivers, were entitled to opportunity to transfer to road driver positions as such positions developed and could meet experience requirement by showing three years of city driving on equipment similar to that used over the road, notwithstanding employer's rule requiring three years of road driver experience. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

34. Civil Rights ⇐46

Fact that not all motor carriers required three years' experience as prerequisite for road driver positions did not require reduction in number of years of experience required by motor carrier as prerequisite for permitting its city drivers, who were victims of past discrimination with respect to hiring

for road driver positions, to transfer to position of road driver as, following removal of requirement that prior experience be as a road driver, experience required was not only racially neutral but was neutral in effect. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

35. Civil Rights ⇐9.10

Equal employment opportunity provisions of Civil Rights Act were not intended to lead to uniform hiring practices across an industry; so long as hiring policies do not discriminate, the provisions do not require their modification. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

36. Civil Rights ⇐9.13

City truck drivers who were required to be given opportunity to transfer to more lucrative road driver positions from which they had previously been discriminatorily excluded could not be disqualified from road driver positions even if they performed inadequately on road test unless they could not be expected to improve sufficiently given normal training. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

37. Civil Rights ⇐46

In employment discrimination action challenging motor carrier's policy against transfer of city truck drivers to road driver positions, trial court's determination that named plaintiffs were unqualified for road driver positions was premature where carrier admitted by stipulation that it had not considered any of the plaintiffs for employment as road drivers. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

38. Civil Rights ⇐9.12

Question of how much seniority city truck drivers would be permitted to take with them upon transfer to road driver positions from which they had previously been discriminatorily excluded should be determined by date on which city drivers

would have qualified for the road driver positions but for discrimination. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

39. Federal Civil Procedure ⇐2397

Judgment by consent binds parties and those in privity with them. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

40. Judgment ⇐707
Release ⇐27

Consent decree entered in government's "pattern and practice" suit against motor carrier and union organizations challenging discriminatory employment practices which were at issue in subsequently brought private class action did not operate as collateral estoppel to prohibit members of class from participating in relief in the class action where members of the class were neither parties to the government suit nor had interests in privity with the government; however, those members of class accepting compensation under consent decree and signing release would be bound by terms of the release. 42 U.S.C.A. § 1981; Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Appeal from the United States District Court for the Western District of Texas.

Before WISDOM, AINSWORTH and GODBOLD, Circuit Judges.

WISDOM, Circuit Judge:

In this employment discrimination case the plaintiffs-appellants attack two ubiquitous practices in the trucking industry: (1) the trucking companies' requirement that "city drivers" resign from their city driver jobs before applying for the more lucrative and sought-after "road" or "line driver" * positions,

* The terms "road driver" and "line driver" are used interchangeably throughout this opinion.

and (2) the companies' rule preventing city drivers from carrying their seniority to road driver jobs. The plaintiffs, Mexican-American city drivers for East Texas Motor Freight (ETMF), brought this action below as a class action, contending that these facially neutral practices of ETMF and the defendant union organizations perpetuate the effects of past discriminatory hiring practices and thus violate Title VII of the Civil Rights Act of 1964[1] and 42 U.S.C. § 1981.[2] The district court found that the cause of action was inappropriate

1. (a) It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . . . . .

(c) It shall be an unlawful employment practice for a labor organization—
(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.
42 U.S.C. § 2000e-2.

2. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
42 U.S.C. § 1981.

for a class action, and that none of the defendants had violated Title VII or Section 1981. We reverse.

I.

Facts

In the trucking industry, "road" or "line driver" is considered a separate job classification from "city, pick-up and delivery driver". Road drivers for ETMF drive 10-speed tractors with semitrailers, carrying freight among the 52 ETMF terminals in 19 states. Road drivers work long hours, and often spend long periods of time away from home, but they have the prestige driving job in the trucking industry, and they generally bring home the highest pay. Freight brought to a terminal by a road driver is unloaded and reloaded onto other trucks, either onto another tractor-trailer, or onto a "bobtail", a truck with the body and engine mounted on the same chassis. A city driver then delivers the merchandise locally.

In conformance with the practice in the trucking industry generally, ETMF "domiciles" road drivers at only some of its terminals: those in cities that are relay points equidistant between major centers, and those in "head haul" cities, cities at the end of a line of service that generate a significant amount of freight to other points in the company's system. In Texas ETMF has six terminals that domicile road drivers, and fifteen terminals that do not.[3] ETMF has city drivers at all terminals.

The primary responsibility for hiring drivers, both city and road, in the ETMF system rests with the manager at the terminal where a vacancy occurs. The manager interviews applicants, reviews their qualifications, and makes recommendations to officials at the corporate headquarters in Dallas. Although the Dallas officials must approve each applicant for employment, the terminal manager makes the affirmative decision to hire. The unions have no responsibility for hiring.

3. Those terminals domiciling road drivers are: Dallas, El Paso, Longview, Pecos, San Angelo, and Texarkana. Only city drivers are domiciled at the following terminals: Abilene, Amarillo, Atlanta, Austin, Beaumont, Brownwood, Ft. Worth, Henderson, Houston, Lubbock, Lufkin, Marshall, Odessa, San Antonio, and Tyler.

ETMF's qualifications for road drivers are more stringent than for city drivers. City drivers must be at least 21 years old and have at least one year pick-up and delivery experience. Road drivers must be at least 27 years old and have three years "immediate prior line haul road experience". Both city and road drivers face a battery of other requirements involving driving, work, credit, and police records. They must be familiar with Department of Transportation regulations, have a high school education or the equivalent, and hold a valid commercial drivers license. Finally, both city and road drivers must pass physical, written, and driving examinations. Everett E. Cloer, ETMF's Vice President in charge of industrial relations testified to the importance of driving tests for road drivers: "Well, first of all [applicants] are given a 25-mile driving test within the city to see if they can handle the transmissions of this equipment, see what their driving reactions are, et cetera. If they pass that, then they are given an in-cab trip with the supervisor. The supervisor rides with them on a student [over-the-road] trip."[4] Counsel for the parties stipulated that the line driver requirements are nondiscriminatory.

City drivers and road drivers are covered by different collective bargaining agreements. The defendant-appellee

4. The importance of road testing as a criterion for hiring road drivers was echoed by Ed A. Asbury, Manager of ETMF's San Antonio terminal. When asked how he would determine whether city drivers were qualified to be road drivers, he answered: "I think I should have to ride with those boys to be able to answer that question. I don't know . . . I would have to—if I were going to make an honest appraisal, I would get out and ride with that man. I would ride with him here in town, and I would ride with him on the freeway. I would ride with him in line haul equipment. I would see what he would do, how he conducted himself, how he handled his equipment."

Local 657 has a collective bargaining agreement with ETMF covering city drivers at ETMF's San Antonio terminal. Local 657 represents no road drivers of ETMF. The defendant-appellee Southern Conference of Teamsters, a delegate body of the International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, is made up of representatives from the affiliated Locals in ten southern states. Separate collective bargaining agreements for city and road drivers are drawn by the Southern Conference and negotiated by the Conference with trucking company representatives. Then the agreements are passed down to the Locals to be approved and made part of the contracts between the Locals and the trucking companies.

Since 1954 ETMF has followed a "no-transfer" policy, prohibiting the transfer of drivers between city and road driver classifications and between terminals.[5] Under the policy, in order for a city driver to obtain a position as a road driver, he must resign his city driver job and apply for a road driver slot. He thereby forfeits all accumulated seniority. In effect, he stands on no better footing in applying for a road driver job than a complete stranger to the company. For the purposes of strengthening his application, he gains no "credit" for his years as a city driver. And if his bid to be a line driver fails, there is no guarantee that he will be rehired as a city driver. ETMF's policy against transfers is complemented by the fact that under collective bargaining contracts between ETMF and Local unions, including the defendant Local 657, city drivers who transfer to the road do not carry over their "competitive-status" seniority, that is, seniority for job bidding and lay off purposes.[6] Under separate collective bargaining agreements for road and city drivers, competitive-status seniority runs from the time an employee enters a particular collective

5. Road drivers for ETMF presently operate under a "modified" terminal no-transfer policy. If a road driver at one terminal is laid off, he can "bump" a less-senior road driver at another terminal.

6. The employee keeps his company seniority for fringe benefit purposes.

bargaining unit. Transfer is not expressly prohibited, but it is not expressly permitted either, and the agreements have been universally interpreted to prohibit the carryover of seniority from one classification to another.

For thirty days in January and February 1972, to ease morale problems among its city drivers who wanted to become road drivers, ETMF relaxed its no-transfer policy and permitted city drivers to transfer to line jobs, if they could qualify.[7] During this period, although all other requirements were maintained, the requirement of three years line driving experience was waived. The modification did not affect the dual seniority system established by the separate collective bargaining agreements. Any city driver transferring to the road under the modified policy still lost his seniority for job bidding and lay off purposes. Moreover, the one-time-only change in policy opened the possibility of transfer only to those city drivers who worked out of terminals domiciling road drivers; the restrictions on interterminal transfers remained in effect. In the Southern Conference area 220 city drivers showed an interest in transferring under the temporary policy, and 35 to 50 city drivers tried out: five succeeded in transferring to road driver jobs.[8]

Against the history of these policies must be juxtaposed one crucial set of facts. The parties stipulated that before 1970 East Texas Motor Freight had never employed a black or Mexican-American as a road driver in the Texas-Southern Conference area.[9] ETMF's road driver force in that area numbered approximately 180, all white/anglo drivers. After charges were filed by plaintiff Jesse Rodriguez with the Equal Employment Opportunity Commission (EEOC) on August 20, 1970, the company hired three Mexican-American road drivers

7. Road drivers were also permitted to transfer to the city.

8. All five of the city drivers to make successful transition to road driver jobs worked out of the Memphis, Tennessee, terminal.

9. The Southern Conference covers all Teamster members in Texas, except for some in El Paso.

in El Paso. By the time of trial, the company had still not hired a single black road driver in Texas. In comparison, approximately 35 percent of ETMF's city drivers in Texas are black or Mexican-American. Of a total of 575 city drivers for ETMF in the state, 111 are Spanish-surnamed, 95 are black, and 369 are anglo.

The three named plaintiffs, Jesse Rodriguez, Sadrach Perez, and Modesto Herrera, are Mexican-American city drivers at ETMF's San Antonio terminal. With the exception of one road driver who temporarily worked out of San Antonio in 1970, ETMF road drivers have never been domiciled in San Antonio. San Antonio city drivers were therefore not able to take advantage of the temporary modification of the no-transfer rule in the winter of 1972. Perez was hired as a city driver in 1959, Herrera was hired in 1964, and Rodriguez was hired in 1965. They stipulated that they were employed at the San Antonio Terminal without regard to race, color, or national origin. Each is a member of Local 657 and the Southern Conference.

Although none of the named plaintiffs made written application for a line driver job until 1970, Herrera made verbal inquiries about transferring to the road as early as 1965. In 1970 the plaintiffs submitted letters to the San Antonio terminal manager, requesting transfer to road driving jobs. The terminal manager received and filed the letters. ETMF stipulated that it never considered these applications for employment as road drivers. On August 20, 1970, Rodriguez filed a written charge with the EEOC complaining that the policies of ETMF, Local 657, and the Southern Conference relegated Mexican-Americans and blacks to city driver jobs. Similar charges were filed by Herrera on March 11, 1971, and by Perez on June 7, 1971. On May 18, 1971, Perez was discharged from his employment with ETMF. The plaintiffs received thirty-day "right-to-sue" letters on October 11 and 13, 1971. On October 26, 1971, the plaintiffs filed this class action suit in district court.

Prior to the trial in this cause, the parties entered into a series of stipulations. In addition to the stipulations already mentioned, the parties agreed to the following:

The claim of discrimination of the Plaintiffs is solely based upon the fact that after their original employment, they have been "locked in" to the lower paying job of city driver and denied a job as line driver because of:

(a) The maintenance of separate seniority rosters for city and line drivers;

(b) The fact that any city driver regardless of his race, if he transferred from city driver classification to a road driver classification, loses his accumulated city seniority;

(c) The Defendant East Texas Motor Freight discouraged inquiries from Plaintiffs concerning the qualifications and/or availability of line driving jobs;

(d) The fact that the Defendant East Texas Motor Freight had always employed Anglo/white applicants as road drivers;

(e) That the company's policy and practice of recruiting line or road drivers has been based to a great extent on a word of mouth system. Since the company's line drivers and supervisory terminal personnel are almost exclusively Anglo/white, such a practice has continued the alleged illegal exclusion of Mexican-Americans and Negroes as road drivers;

That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981.

Over strenuous objection at trial, the district court admitted evidence relating to the qualifications of the named plaintiffs to be road drivers. After trial, the court concluded that none of the named plaintiffs could satisfy all of the road driver requirements "according to the company manual due to age or

weight or driving record". Furthermore, the court found, "[t]he driving, work, and/or physical records or the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers". In conclusion, the court found that "[t]he plaintiffs did not discriminate against the plaintiffs or any other employee or union member on the basis of race or otherwise". The plaintiffs appeal. The Equal Employment Opportunity Commission, as amicus curiae, has filed a brief urging reversal of the decision of the district court.

II.

The Class Action Claim

The plaintiffs brought this suit "on their own behalf and on behalf of other Mexican-American and black individuals who similarly have been denied equal employment opportunities by the defendants and additionally on behalf of Mexican-American and black individuals who may, in the future, be denied equal employment opportunities by the defendants because of their national origin and race". They described the class more particularly as "all of defendant East Texas Motor Freight's Mexican-American and black in-city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas . . . [and as] all Mexican-American and black applicants for line driver positions with East Texas Motor Freight included in the above area covered by the Southern Conference of Teamsters from July 2, 1965, to the present". Neither the plaintiffs nor the defendants moved for a ruling under Fed.R.Civ.P. 23(c)(1) as to whether the suit could be maintained as a class action, and the court made no ruling until after the trial was completed. In its findings the court stated:

> 31. Plaintiffs have at no time moved for a prompt determination of the question of whether or not this cause of action should be maintained as a class action and have offered no credible proof on the question.
>
> 32. Plaintiffs have offered no proof of liability or damages as to any class, having confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs, and having stipulated at the commencement of trial that the only issue before this Court with respect to the defendant truck line involved its failure to consider the individual plaintiffs' application for employment as road drivers.

Concluding that the cause of action was "not a proper one for class action", the court dismissed the class action claims. In our opinion, the district court's dismissal of the class action was erroneous.

[1] Rule 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained". A class action may not be dismissed because the class representatives fail to ask for a ruling on the propriety of the class nature of the suit. That responsibility falls to the court. "The court has an independent obligation to decide whether an action brought on a class basis is to be maintained even if neither of the parties moves for a ruling under subsection (c)(1)". Wright & Miller, Federal Practice and Procedure, Civil § 1785 (1972).

[2–5] The plaintiff class representatives, of course, must establish that the action meets the requirements of Rule 23(a).[10] See Rossin v. Southern Union Gas Co., 10 Cir. 1973,

10. (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
Fed.R.Civ.P. 23.

472 F.2d 707, 712; Johnson v. Georgia Highway Express, Inc., 5 Cir. 1969, 417 F.2d 1122, 1125 (Godbold, J., concurring); 3B J. Moore, Federal Practice ¶ 23.02–2 (2d ed. 1974); Wright & Miller, Civil § 1759 at 578. But the requirements of Rule 23(a) must be read liberally in the context of suits brought under Title VII and Section 1981. See Wright & Miller, Civil § 1771. Suits brought under these provisions are inherently class suits. By definition, discrimination on the basis of race or national origin is a class wrong. Oatis v. Crown Zellerbach Corp., 5 Cir. 1968, 398 F.2d 496, 499. And a suit charging employment discrimination is naturally "a sort of class action for fellow employees similarly situated". Jenkins v. United Gas Corp., 5 Cir. 1968, 400 F.2d 28, 33; see Parham v. Southwestern Telephone Co., 8 Cir. 1970, 433 F.2d 421, 428; cf. Newman v. Piggie Park Enterprises, 1968, 390 U.S. 400, 401–402, 88 S.Ct. 964, 19 L.Ed.2d 1263. When class relief is sought in the complaint, therefore, the court should liberally apply the requirements of Rule 23(a). See Bing v. Roadway Express, Inc., 5 Cir. 1973, 485 F.2d 441, 446; compare Danner v. Phillips Petroleum Co., 5 Cir. 1971, 447 F.2d 159, 164 (class relief not sought in complaint).[11]

[6] There is no serious dispute that the plaintiffs here satisfied the first three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical. The defendants argue strenuously, however, that there was insufficient guarantee that the named parties would "fairly and adequately protect the interests of the class".

The defendants maintain that the named plaintiffs have acted antagonistically to the interests of a majority of Mexi-

11. In *Danner* this Court expressly limited its holding: "All we hold is that class action relief must be predicated upon a proper class action complaint satisfying all the requirements of Rule 23". 447 F.2d at 164 n. 10.

can-American and black city drivers. The complaint requests that the court order the city and line driver seniority lists merged to create a single seniority system based solely on the date that an employee first joined the company. The desirability of such relief, argue the defendants, was expressly rejected at a membership meeting of the defendant Local 657 on February 11, 1973, approximately two weeks after the completion of the trial. An affidavit recounting the results of voting at the meeting was admitted into evidence under Fed.R.Civ.P. 59. At the meeting the union members voted 87 to 21 against a proposal that the city and road driver contracts be merged and that city drivers be permitted to transfer to the road while road drivers were permitted to transfer to the city. Of the 138 people present at the meeting, 121 were city pick-up and delivery drivers. Eighty-three were Mexican-American, 42 were Anglo, and 13 were Negro. If all possible Anglo votes were deducted from the total against it, the proposal still would have been rejected by a majority of Mexican-American and Negro votes.

We do not ascribe the significance to the vote that the defendants urge. We cannot tell what assumptions were made implicit. Furthermore, the membership of Local 657, even the Mexican-American and black membership, is far from congruent with the class described in the complaint. The Local's membership is both more restricted and more extensive. The Local draws its membership from the San Antonio area; the complaint covers city drivers throughout Texas. The Local has members who work for trucking firms other than ETMF; the class outlined in the complaint is restricted to employees or applicants of ETMF. The extent to which the vote represents the actual preference of the class, therefore, is unclear.

[7–9] Even taking the results of the vote at face value,[12] we reject the district court's conclusion that there was suffi-

12. The outcome of the vote is consistent with what one might expect of a vote of ETMF's San Antonio city drivers. Separate

cient reason to dismiss the class action in this case. Especially in light of the fact that the evidence of the union vote was not received until two weeks after the trial, there were two preferable options open to the trial judge. First, he could have shaped the class to remove any possible antagonism between the representatives and some of the city drivers. The court could have narrowed the class or separated it into subclasses for purposes of relief. See Oatis v. Crown Zellerbach Corp., 398 F.2d at 499. Or, the court could have shaped the relief to avoid any injustice to the dissenting class members. District courts have wide discretion in fashioning relief under Title VII: Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 414; Bing v. Roadway Express, Inc., 485 F.2d at 448–449. And flexibility and careful tailoring of judicial decrees in Title VII cases are the order of the day. See, e. g., Sabala v. Western Gillette, Inc., S.D.Tex.1973, 362 F.Supp. 1142. The disagreement here concerned only the proper remedy; there was no antagonism with regard to the contention that the defendants practiced discrimination against the plaintiff class. We do not believe that disagreement within the class as to the remedy desired, surfacing so late in the litigation, should have resulted in a dismissal of the class action.

Because the trial was completed before the court made a ruling whether the class action could be maintained, there were involved none of the imponderables that make the

seniority rosters in separate contracts prevent laid-off road drivers from bumping less senior city drivers from their jobs. Because ETMF does not domicile road drivers in San Antonio, to take advantage of a merger of seniority rosters and obtain a road job, a San Antonio city driver with ETMF would have to move to another city. Those city drivers who would not desire such a move, or who would not desire to transfer to the road for some other reason, would not gain from a merger of seniority rosters. We note that in a similar case a court has recently refused to order a merger of seniority rosters because to do so would injure those members of the plaintiff class who did not wish to transfer to road driving jobs. Sabala v. Western Gillette, Inc., S.D.Ky.1973, 362 F.Supp. 1142, 1153.

decision so difficult early in the litigation, and that demand a substantial amount of district court discretion and corresponding appellate deference. See Johnson v. Georgia Highway Express, Inc., 417 F.2d at 1123. We have before us a record of the proceedings, completed as a class action, and we can judge for ourselves the possible effects of any antagonism of interests. We find these effects insubstantial and curable. We conclude that the plaintiffs met the requirements of Rule 23(a) and established a proper class action under Fed.R.Civ.P. 23(b)(2).[13]

[10, 11] The district court's finding that the plaintiffs offered no proof on the question of liability or damages to any class is clearly erroneous. As we describe more fully below, the plaintiffs entered into evidence statistics sufficient to present a prima facie case of past hiring discrimination, transmitted into the present by the no-transfer rule and separate seniority rosters which "lock" employees into city driver positions and prevent their transfer to road driver status. The plaintiffs further submitted, without objection, detailed information pertaining to all ETMF city drivers including their names, seniority dates, and domiciles. It is true, as the district court noted, that the plaintiffs concentrated at trial on the individual claims of the named plaintiffs. But the plaintiffs were not required to present more than a prima facie case of discrimination against the class. Nor did the plaintiffs effectively abandon their class claims by stipulating that "the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver

13. (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

Fed.R.Civ.P. 23.

applications constituted a violation of Title VII and 42 U.S.C. § 1981". The stipulation was apparently entered in an attempt to eliminate some confusion in the exposition of evidence at trial, not to foreclose the class issues. The plaintiffs continued to proceed as in a class action. And this was made clear to the trial court and the defendants.[14]

[12] To the extent that the district court's finding that the plaintiffs failed "to offer proof of liability or damages as to any class" refers to the class of "all Mexican-American and black applicants for line driver positions with East Texas Motor Freight", the finding is not erroneous. The plaintiffs never pursued the action on behalf of these individuals, and the district court's dismissal of the class action on their behalf was proper. On remand, the class considered for relief should be defined as all of East Texas Motor Freight's Mexican-American and black city drivers included in the collective

14. The following colloquy took place between the trial judge and Mr. Heidelberg, counsel for the plaintiffs:

THE COURT:

I assume, this being a matter before the court, that Mr. Heidelberg probably has in mind using this witness to establish a general practice and to show that this man was similarly treated although he may have no personal complaint. It would merely corroborate the testimony that such a practice exists. For that limited purpose—

MR. HEIDELBERG:

For that purpose and also, Your Honor, it has not been established that this is not a class action. The allegation is made in the complaint and there have been no motions filed. The answers of the defendants deny that this is a class action, but of course we maintain that there is class action involved.

THE COURT:

Well, are you contending now as far as this trial is concerned that this is a class action?

MR. HEIDELBERG:

Yes, Your Honor.

THE COURT:

And how many people are you going to try to establish this by?

MR. HEIDELBERG:

As outlined in the complaint, Your Honor, the class would consist of the Mexican-American and black city drivers who are located in the State of Texas covered by the jurisdiction of the Southern Conference Supplemental Agreement.

bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.

III.

Liability

In the last few years we have seen a large number of suits brought in federal court, attacking facially neutral policies which allegedly discriminate against minority city drivers by perpetuating patterns of discrimination in the hiring of line drivers by private firms in the trucking industry.[15] As the federal courts have thus become familiar with the practices in the trucking industry, a clear pattern has emerged: throughout much of the industry, trucking companies, and the unions representing drivers, have erected barriers to the movement of non-white/non-Anglo workers from pick-up and delivery jobs to the coveted road driver positions. The employment practices attacked in this suit—the no-transfer and seniority policies—are prevalent in the trucking industry. Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they are not generally permitted to carry over their seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively "locked in" their city driving jobs with no realistic possibility of transferring to line driving positions. Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies. But, as the courts have noted with some frequency, the policies often operate to perpetuate the effects of hiring discrimination. The overall result is a situation where in many areas of the country blacks and Mexican-Americans serve as city drivers, while road-driver fleets in private trucking firms, at least until very recently,

15. See, e. g., the cases cited in note 17 *infra*.

have been virtually all-white/Anglo.[16] Thus it is that facially neutral no-transfer and seniority policies have come under a broad attack, for "[i]t is now beyond cavil that Title VII of the Civil Rights Act of 1964 proscribes employment practices and procedures which, although presently neutral and nondiscriminatory on their face, tend to preserve or continue the effects of past discriminatory practices". United States v. N. L. Industries, Inc., 8 Cir. 1973, 479 F.2d 354, 360. See Griggs v. Duke Power Co., 1971, 401 U.S. 424, 430, 91 S.Ct. 849, 28 L.Ed.2d 158; Pettway v. American Cast Iron Pipe Co., 5 Cir. 1974, 494 F.2d 211, 236; Local 189, United Papermakers & Paperworkers v. United States, 5 Cir. 1969, 416 F.2d 980, 990–991, cert. denied, 397 U.S. 919, 90 S.Ct. 926, 25 L.Ed.2d 100.

A. *Discrimination by East Texas Motor Freight*

We begin by examining the past hiring patterns of ETMF. See United States v. Jacksonville Terminal Co., 5 Cir. 1971, 451 F.2d 418, 450, cert. denied, 406 U.S. 906, 92 S.Ct. 1697, 31 L.Ed.2d 815. Although the plaintiffs do not attack ETMF's road-driver hiring practices—and indeed stipulated that they are not now discriminatory—we must begin there. A pattern of past discriminatory hiring is essential to the plaintiffs' case. See Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, cert. denied, 401 U.S. 954, 91 S.Ct. 972, 28 L.Ed.2d 237.

16. Two recent studies have confirmed that Negroes and Mexican-Americans have been excluded from line driving jobs. One study found that, nationally, Negroes comprised only 2.4 percent of the over-the-road drivers for private trucking firms in 1968. Firms that employed more than 100 persons had only one-percent Negro road drivers. Leone, The Under-utilization of Negroes as Truck Drivers by For-Hire Motor Carriers, 22 Lab.L.J. 631, 633 (1971). Another Study, covering 329 trucking companies for the year 1970, found that Negroes comprised 2.7 percent of the companies' road drivers. In the same companies, Spanish-surnamed Americans made up only .8 percent of the road drivers. See Nelson, Equal Opportunity in Trucking: An Industry at the Crossroads (GPO 1971).

[13, 14] A prima facie case of discrimination may be established by statistical evidence, and statistical evidence alone. "The inference [of discrimination] arises from the statistics themselves and no other evidence is required to support the inference." United States v. Hayes International Corp., 5 Cir. 1972, 456 F.2d 112, 120. The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. By the date of trial, two and a half years later, ETMF had hired three Mexican-Americans to join its Texas road driver force of approximately 180 drivers. By trial ETMF had still not hired a Negro road driver in Texas.

These figures establish a prima facie case of past discrimination in hiring. In other trucking cases the statistics have shown a similar pattern. In Jones v. Lee Way Motor Freight, Inc., 10 Cir. 1970, 431 F.2d 245, 247, for example, the Court summarized: "[T]here were no Negro line drivers; most whites were line drivers; and all Negroes were city drivers." Similarly, in Bing v. Roadway Express, Inc., 5 Cir. 1971, 444 F.2d 687, 688, the Court noted: "All road drivers are, and always have been white; all Negro drivers are city drivers, though not all city drivers are Negro." The similarity between the employment situations in both *Bing* and *Jones* and that here is striking. In *Bing* and *Jones*, and in each of the cases cited in the margin, the court held that the statistics were sufficiently potent to constitute a prima facie case.[17]

17. Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416 (At ETMF's Memphis terminal, all of the 105 road drivers were white. Of the 131 city drivers, 43 were black.); Witherspoon v. Mercury Freight Lines, Inc., 5 Cir. 1972, 457 F.2d 496 (No black had ever worked for Mercury Freight as a long haul driver.); Hairston v. McLean Trucking Co., M.D.N.C.1973, 62 F.R.D. 642 (Of 479 over-the-road drivers at Winston-Salem terminal, nine were black.); United States v. Navajo Freight Lines, Inc., C.D.Calif.1973, 6 FEP

[15] Once the plaintiffs established a prima facie case, the burden fell to the defendants to rebut the statistics or to explain the disparity in hiring.[18] See Rowe v. General Motors Corp., 5 Cir. 1972, 457 F.2d 348, 358. Having stipulated to the statistics, the defendants cannot, of course, dispute them. But the defendants do imply that the force of the statistical disparity is countered by the plaintiffs' stipulations that ETMF's qualifications for road drivers are not discriminatory and that the plaintiffs were employed at the San Antonio terminal without regard to race or national origin. The defendants also argue that the plaintiffs have not shown that any members of the plaintiff class were qualified as road drivers. We reject these contentions.

[16, 17] First, only historical hiring practices are at issue here. Whatever the nature of present hiring practices,[19] they neither explain nor justify, without more, the past failure to hire minority line drivers. Without some proof presented by the defendants to the contrary, we must assume that the "lily white"/Anglo nature of the ETMF road driver fleet until 1970 resulted from discriminatory hiring practices.

Cases 274 (No black or Spanish-surnamed road drivers until 1970.); Sabala v. Western Gillette, Inc., S.D.Tex.1973, 362 F.Supp. 1142 (Of 29 road drivers in Houston, 28 were white/anglo; one was Mexican-American. Of 65 drivers in Houston, 42 were either black or Mexican-American.); United States v. Lee Way Motor Freight, Inc., W.D.Okl.1973, 7 EPD ¶ 9066 (940 road drivers were white, 14 were black, and 12 were other than white or black.); Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 6 FPD ¶ 885 (In 1968 of 150 road drivers for Yellow Freight in the Southern Conference area, none were black. As of May 12, 1972, only 3.6 percent of Yellow Freight's road drivers in the Southern Conference Area were black).

18. Although the union defendants are not responsible for ETMF's hiring policies, the case against the unions, like that against ETMF, begins with the showing of past hiring discrimination that originally operated to foreclose the road driver jobs to blacks and Mexican-Americans. See p. 1282, *infra*. The unions thus join ETMF in its effort to rebut the prima facie case of hiring discrimination.

19. We do not accord the plaintiffs' stipulation concerning present hiring practices the broad reading that the defendants do. See p. 1277, *infra*.

[18] Second, we accord no weight to the stipulation that the named plaintiffs were not discriminated against when they were hired at the San Antonio terminal as *city* drivers. It was their inability to gain a *road* driver job with ETMF at any terminal in Texas that the plaintiffs decry.

Finally, the defendants rely on language from McDonnell Douglas Corp. v. Green, 1973, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, in which the Court said:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Nothing in this language is inconsistent with the accepted practice of federal courts' recognizing statistics as establishing a prima facie case of employment discrimination. Sagers v. Yellow Freight System, N.D.Ga.1973, 5 EPD ¶ 8885 at 5759. In *McDonnell Douglas* a black worker, laid off in a reduction-in-force, complained that he was not rehired because of his race and involvement in the civil rights movement. The Court emphasized that the "critical issue . . . . concerns the order and allocation of proof in a private, [*non-class-action*] challenging employment discrimination". 411 U.S. at 800, 93 S.Ct. at 1823. (emphasis supplied). Furthermore, the Court observed in a crucial footnote that the test outlined in the text of the opinion for a prima facie case "is not necessarily applicable in every respect to differing factual situations". 411 U.S. at 802, n. 13, 93 S.Ct. at 1824.

The present case differs in several significant respects from *McDonnell Douglas*. First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor

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that might have discouraged the respondent from applying for a job. Indeed, he had had a job with the company, and its refusal to rehire him after his layoff formed the gravamen of the complaint. In contrast, at the time of Rodriguez's complaint to the EEOC, ETMF had never hired a black or Mexican-American line driver in the Texas-Southern Conference area. Given these past hiring practices, "it is not unreasonable to assume that minority persons [would] . . . be reluctant to apply for employment, absent some positive assurance that if qualified, they [would] in fact be hired on a more than token basis". Carter v. Gallagher, 8 Cir. 1972, 452 F.2d 315, 331 (en banc). It would be unrealistic to require the plaintiffs to show that blacks and Mexican-Americans applied for road driver jobs they knew they could not obtain. See Bing v. Roadway Express, Inc., 485 F.2d at 451; Jones v. Lee Way Motor Freight, Inc., 431 F.2d at 247. We note also another distinction. In *McDonnell Douglas* the respondent's qualifications were undisputed. He had held the job, and apparently served satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring--the road test—has been denied to the class of city drivers. Deprived of the opportunity to take a driving test, the plaintiffs could not prove they were qualified to become road drivers.

[19–22] Proof that the relevant labor pool lacks qualified minority persons may, of course, even in a class action, rebut a prima facie case of hiring discrimination. Congress did not intend that Title VII force employers to hire unqualified applicants of *any* race or ethnic background. Griggs v. Duke Power Co., 410 U.S. at 430, 91 S.Ct. 849; Sagers v. Yellow Freight System, Inc., 5 EPD at 5758. But it was ETMF's burden to show that its history of hiring only white/Anglo line drivers resulted from a scarcity of available Negroes and Mexican-Americans qualified to serve in that position. United States v. Hayes International Corp., 456 F.2d at 120. ETMF has not met this burden.

The next steps in our analysis were clearly delineated by Judge Thornberry in *Bing:* "Once it had been established that an employer or union has discriminated in the past, then, the inquiry is twofold: (1) Does the present policy perpetuate the past discrimination? (2) Is the present policy justified by a showing of business necessity?" 444 F.2d at 690.

The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. Together, they have removed all realistic opportunity for transfer. Under the no-transfer policy a city driver wishing to transfer to road status must first resign his city driver position, with no assurance that he will be hired as a line driver, and no assurance that if he fails to be hired he will be rehired as a city driver. Even if the city driver were to become a road driver, because of the separate seniority rosters he would lose his accumulated competitive-status seniority. He would have the last choice of routes and would be the first laid off. And if laid off, he would have no "bumping" rights to recover his city driver job "In any industry loss of seniority is a critical inhibition to transfer." 451 F.2d at 453. It is no surprise, then, that when the company temporarily relaxed in 1972 its no-transfer policy and its requirement that road drivers have three years line haul experience only five ETMF city drivers in the entire Southern Conference area took, qualified for, and held the road driver job. For a city driver with a significant amount of seniority the choice must have been a difficult one indeed. The named plaintiffs testified that they were unwilling to give up their city driving seniority to transfer to road driving jobs they otherwise desired. In the strictest sense, city drivers were "locked" into city driving jobs. The discrimination that removed the possibility that a Mexican-American or Negro could obtain a line driver job when first applying to the company was thus continued and perpetuated by the

no-transfer and seniority policies which prevented the city drivers from later transferring to road driver jobs.

We turn to the question whether ETMF has justified the no-transfer policy and seniority system by a showing of business necessity. The business necessity standard is strict.

> "[T]he 'business necessity' doctrine must mean more than that transfer and seniority policies serve legitimate management functions. Otherwise, all but the most blatantly discriminatory plans would be excused even if they perpetuated the effects of past discrimination. . . . Necessity connotes an irresistable demand. To be preserved, the seniority and transfer system must not only directly foster safety and efficiency of a plant, but also be essential to those goals. . . . If the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued.

United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, 662, cert. denied, 404 U.S. 959. "In other words, management convenience and business necessity are not synonymous." United States v. Jacksonville Terminal Co., 451 F.2d at 451.

[23] The business necessity test essentially involves balancing the need for the challenged practice or policy against its discriminatory impact. The business purpose must be "sufficiently compelling to override any racial impact"; it must "effectively and efficiently" carry out its business purpose; and there must be no acceptable alternative practice. Pettway v. American Cast Iron Pipe Co., 494 F.2d at 246; Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798, cert. denied, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655.

[24] ETMF advances two justifications for its no-transfer policy. The company first contends that the no-transfer policy is necessary to protect employees, property, and the general

public. ETMF conjures up visions of an unqualified driver "hurtling through space, if you will, at 60 miles an hour with a rig of gross vehicle weight of 72,000 [pounds]".[20] While we do not underestimate the potential dangers raised by unqualified drivers, these can be effectively diminished and by carefully screening transferees.[21] See Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416; Bing v. Roadway Express, Inc., 444 F.2d at 691. The visions invoked by ETMF argue for continued strict qualifications for road drivers, but they are not sufficient justification for the no-transfer policy. Second, ETMF argues that as a driver-salesman the city driver's contact with customers is an important element in customer relations. The implication is that if city drivers are permitted to transfer, ETMF might lose customers. We must reject this contention also. Loss of city drivers by transfer is no more harmful to the company's pick-up and delivery business than loss for any other reason. We agree with the district court in Sagers v. Yellow Freight System, Inc., 6 EPD at 5760:

> The city driver's unique functions and skills may justify treating it as a separate job classification from that of road driver; it does not constitute an overriding business justification for denying qualified city drivers the opportunity to transfer to the road driver position where the latter position was initially closed to them on the case of race.

ETMF portrays its seniority system as preferred by the majority of black and Mexican-American city drivers. The company relies on the vote taken at the membership meeting of Local 657 where a majority of the blacks and Mexican-Americans rejected a proposal to merge city and road seniority rosters. "It is obviously good personnel management", argues ETMF, to honor the preference of its Mexican-Ameri-

20. Brief for Appellee East Texas Motor Freight 33, quoting testimony of H. L. Johnson, President of ETMF.

21. ETMF has a continuous training program for road drivers, which includes on-the-job training. The training program was accelerated after the no-transfer system was temporarily modified in 1972.

members of the plaintiff class of city drivers cannot qualify for road driver jobs, how can it be said that it is the no-transfer and seniority policies that lock them in city jobs? Rather, the argument continues, city drivers are locked in by their inability to qualify for the sought-after line driver jobs, and ETMF is under no obligation to permit city drivers to transfer to line driver jobs for which they are unqualified.

ETMF would have us reverse the burden of proof, placed firmly on the defendant by the plaintiffs' prima facie case of past hiring discrimination perpetuated by facially neutral practices and policies. We stated earlier that the burden rested on the defendants to show that the failure to hire minority persons as road drivers resulted from an absence of qualified minority drivers available. So too we think the burden must remain on the defendants to prove that the discrimination shown by the plaintiffs' prima facie case is not perpetuated by present policies in that no minority city drivers are now qualified to transfer to road driver jobs. To our knowledge no court has hinged a finding of liability in a trucking case on proof that the plaintiff class of city drivers contains those qualified to assume road driver responsibilities. That some of the class will be found qualified to transfer when the discriminatory restrictions are removed has been uniformly assumed. Winnowing the qualified from the unqualified has been left to the remedy stage; only those city drivers wishing to transfer who meet objective and nondiscriminatory standards of the company are, in the final analysis, entitled to relief.

We agree with this approach. It is not the failure to hire as a line driver every city driver who would like to transfer to the road that forms the gist of the complaint in cases like the one before us. It is the policies of the company which discourage and prevent transfer regardless of qualifications that are under attack. In sum, we are of the opinion that ETMF had the burden of proving that none of the plaintiff

class was qualified to transfer to the road.[23] It was not the burden of members of the plaintiff class to establish their qualifications before a case of discrimination could be made.

We recognize that by a literal reading of ETMF's road driver requirements, none of the plaintiff class of city drivers could qualify for a road driver job. No present city driver has three years' "*immediate* prior line haul experience". Nor, we assume, do many city drivers have three years' experience on the road, gained at any time; the spate of trucking cases that have been marched through the federal courts give clear indication of the difficulty that blacks and Mexican-Americans have had nationwide obtaining road driver jobs with private trucking firms. We do not, however, accept the criteria ETMF employs in determining whom to hire as road drivers. ETMF's road driver requirements must be read against the business necessity test. That standard, always stringent, requires that we scrutinize requirements of experience when that experience has been discriminatorily denied.

[26] Although requiring experience at a particular job is neutral and job-related on its face see Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1145 (1971), it is discriminatory to require experience as a prerequisite to employment when the experience is unavailable to minority persons. Blumrosen, Seniority and Equal Opportunity: A Glimmer of Hope, 23 Rut.L.Rev. 268, 309 (1969). We have in this Circuit approved a lower court's striking down an experience requirement as a criterion of membership in a labor union when "negroes were prevented from gaining such experience due to the union's racial discrimination". Local 53, International Association of Heat & Frost Insulators & Asbestos Workers v. Vogler, 5 Cir. 1969, 407 F.2d 1047, 1054–1055; see also United States v. Sheet Metal Workers, Local 36, 8 Cir.

23. Ezra Bierle, dock foreman at ETMF's San Antonio terminal, testified that from 1968 or 1969 the tractor-trailer equipment driven by city and road drivers has been essentially the same.

1969, 416 F.2d 123; Dobbins v. Local 212, International Brotherhood of Electrical Workers, S.D.Ohio 1968, 292 F.Supp. 413. More significantly, we held in United States v. Jacksonville Terminal Co., 451 F.2d at 453, that where blacks were prevented by racial discrimination from utilizing their skills in the railroad industry, experience as a job criterion could not properly be confined to *railroad* experience. We do not imply that all experience requirements that act to perpetuate discrimination are illegal; only that they are illegal unless justified as a business necessity. And, as we have said, ETMF has not proved that three years' immediate line-haul experience is a business necessity for transfer of its city drivers to line-haul duties.

[27] The defendants place great reliance on the plaintiffs' stipulation that "[t]he standards and qualifications of East Texas Motor Freight for its road drivers are not discriminatory". The defendants argue that, rather than conceding only that the criteria are facially neutral, the stipulation waived any argument that the road driving requirements have a disparate impact and discriminatory effect. We do not accord the stipulation such a prominent position in this suit. As we have noted, ETMF's criteria for road drivers automatically exclude all members of the plaintiff class, including the named plaintiffs. No city driver now employed can have three years' *immediate* prior line haul experience. And none of the named plaintiffs, at least, has three years' experience road driving gained at any time. By the defendants' reading of the stipulation, therefore, the plaintiffs have disqualified themselves from the very relief they seek most urgently—transfer to road driver jobs. We cannot accept the interpretation that the plaintiffs, represented by counsel conceded by the defendants to be experienced Title VII attorneys, stipulated away their right to relief on the eve of trial.

In conclusion, the plaintiffs established an unrebutted prima facie case against ETMF of past hiring discrimination. It is manifest that the harmful effects of this past discrimination

have been transported into the present through ETMF's facially neutral no-transfer and seniority policies. No compelling business necessity has been offered to justify ETMF's policies. In our view the district court's finding that ETMF did not discriminate against the named plaintiffs, or by implication the plaintiff class, is clearly erroneous. ETMF must be held to have violated 42 U.S.C. § 2000e-2[24] and 42 U.S.C. § 1981.[25]

B. *Discrimination by Local 657 and the Southern Conference*

The plaintiffs contend also that Local 657 and the Southern Conference of Teamsters have acted to perpetuate the discrimination against the plaintiff class of city drivers by creating collective bargaining agreements that establish separate seniority rosters for road and city drivers without provision for seniority carryover for minority city drivers who desire to transfer to road jobs. Before examining the substance of this contention, we pause to outline in more detail the manner in which the collective bargaining agreement between ETMF and Local 657 came into being.

Although the collective bargaining agreement is a contract between ETMF and Local 657, it is the product of negotiation on a national and regional scale. First, there is the National Master Freight Agreement, negotiated on a nationwide basis between the Trucking Employers, Inc. and the National Over-the-Road and City Cartage policy and Negotiating Committee of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. The National Negotiating Committee represents the local unions; the locals give powers of attorney to permit the National Negotiating Committee to act on their behalf. Although the Master Agreement must be ratified by the locals, ratification is generally a formality. Once the agreement is accepted by a majority of

24. See note 1, *supra*.

25. See note 2, *supra*.

the local unions, it goes into effect and binds all locals.[26] The Master Agreement covers both city and road drivers. Then there are the Supplemental Agreements. Like the Master Agreement, although Supplemental Agreements are signed and administered by each local union at each terminal, "they are negotiated on an areawide basis by Local representatives of employees of all unionized trucking companies in that area". United States v. Pilot Freight Carriers, Inc., M.D.N.C. 1972, 54 F.R.D. 519, 521. In our case the Supplemental Agreements were negotiated by the Southern Conference of Teamsters. From these negotiations came, so far as we are now concerned, two separate agreements, one covering road drivers and one covering city drivers. The agreements provide for seniority to run from the date of entry into a particular collective bargaining unit. At the terminal level, these separate agreements are administered by union locals. In the case before us, the city drivers for ETMF in San Antonio are represented by Local 657. Local 657 is an integrated union. Since 1952 a majority of the employees working for ETMF within the jurisdiction and membership of Local 657 have been blacks and Mexican-Americans.

[28] As we mentioned earlier, it is the creation and maintenance of separate seniority rosters for road and city drivers without provision for seniority carryover by minority city drivers that forms the crux of the complaint against the union defendants. We agree with the plaintiffs that the discrimination against the black and Mexican-American city drivers that closed out the possibility of their being hired originally as road drivers was continued and reinforced by union action and inaction. For their role in continuing the effects of this

26. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Constitution, art. XVI, § 4 (1966). "While there is a separate formal contract between each local union and [the defendant company] in effect, the National Master Freight Agreement is published in pamphlet form and accepted nationwide, with a blank in which the number of each individual local union is inserted." Sagers v. Yellow Freight System, Inc., N.D.Ga.1972, 58 F.R.D. 54, 57.

discrimination the union defendants must share the blame and the liability.

We recognize that the prima facie case against ETMF for discrimination in the hiring of road drivers falls only indirectly against the union defendants. The company has always exercised full responsibility for hiring; the unions have never exercised any. We have discussed how the inability of city drivers to carry over their competitive-status seniority formed an important link in the chain that "locked" minority drivers into city driver jobs. Of this the unions were not unaware. Local 657 concedes in its brief that the "most important thing to an employee working under a collective bargaining agreement, except perhaps for wage rates, is his seniority".[27]

[29] The plaintiffs' prima facie case of hiring discrimination, and proof that the seniority system, a creature of the collective bargaining agreement, transmitted the discrimination into the present, shifted the burden to the defendant unions to show that the present discriminatory effects were unavoidable, that is, required as a business necessity.

[30] The primary justification offered by the union defendants is that in contributing to the establishment of separate seniority rosters they were merely following the desires of the majority of their black and Mexican-American members. Once again the defendants rely on the post-trial defeat by members of Local 657 of a proposal to merge city and road driver contracts as an indication of the preferences of a majority of Mexican-American and black city drivers. As we mentioned earlier, the degree to which the vote should be taken to represent the true desires of members of the plaintiff class is uncertain. In any event, the unions perceive their responsibility too narrowly. There are established ways to eliminate the lock-in effect of separate seniority rosters without merging rosters and jeopardizing the seniority rights of those city drivers who remain in their positions. Most obvi-

27. Brief for Appellee Teamsters Local Union 657, at 16.

ously, seniority carryover can be allowed on a one-time-only basis for qualified minority city drivers who wish to transfer to the road. See, e. g., Thornton v. East Texas Motor Freight, supra; Bing v. Roadway Express, Inc., 485 F.2d 441; United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532. No reciprocal arrangement for road drivers would have been necessary, because they have suffered no discrimination. See United States v. Chesapeake & Ohio Ry. Co., 4 Cir. 1972, 471 F.2d 582, 593. We believe a one-time-only transfer with seniority carryover was an alternative that could have eased the discriminatory effects of the separate seniority lists without injury to any minority city driver. This reasonable alternative vitiates the business necessity defense. See United States v. St. Louis-San Francisco Railway Co., 464 F.2d 301 at 308; Robinson v. Lorollard Corp., 444 F.2d at 798.

For their role in establishing separate seniority rosters that failed to make allowance for minority city drivers who had been discriminatorily relegated to city driver jobs, Local 657 and The Southern Conference must be held accountable. They have violated 42 U.S.C. § 2000e–2 and 42 U.S.C. § 1981. The district court's finding to the contrary is clearly erroneous.

IV.

Remedy

[31] Because the district court concluded that the defendants were not liable under Title VII or 42 U.S.C. § 1981, it never reached the question of remedy. We remand for the court's consideration of this issue. The district courts have broad remedial powers to eliminate the present effects of past discrimination, and a large measure of discretion in modeling a decree. Local 53, International Heat & Frost Insulators & Asbestos Workers v. Vogler, 407 F.2d at 1052. The discretion is not unbridled, however, and we provide the boundaries within which the decree in this case must be drawn.

A. *Transfer*

[32, 33] We have long subscribed in this circuit to the theory that those who suffer discrimination under Title VII must be permitted to take their "rightful place" when job openings develop. As we said in Local 189, United Papermakers & Paperworkers v. United States, 416 F.2d at 988:

> The Act should be construed to prohibit the *future* awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their *present* positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings. This solution accords with the purpose and history of the legislation.

See Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv.L.Rev. 1260 (1967). Thus, black and Mexican-American city drivers, many of whom would now be road drivers but for the discrimination of the defendants, must be given an opportunity to transfer to the road as road driving job openings develop.

ETMF need not permit unqualified plaintiffs to transfer to the road, but in determining who is qualified ETMF must use criteria that either have no disparate impact along the lines of race or national original, or that can be justified as a business necessity. We have already stated that the requirement of three years prior road haul experience must give way. Because road driving experience has been denied to blacks and Mexican-Americans as a class, and because ETMF has not justified the experience requirement as essential, it may not be confined to road driving when to do so would discriminate against members of the plaintiff class. ETMF having failed to prove that three years' line-haul experience is a business necessity for transfer, each city driver must be considered to meet the experience requirement by showing three years of city driving on equipment similar to that used over the road.

[34, 35] The plaintiffs argue that, because not all trucking companies require three years experience, we should also reduce the number of years experience required. See, e. g., Bing v. Roadway Express, Inc., 485 F.2d 441 (1 year); Sayers v. Yellow Freight System, Inc., N.D.Ga.1973, 6 EPD ¶ 8885 (2 years). Once the requirement of *road* experience is removed, however, the experience requirement is not only *facially neutral,* it is *neutral in effect.* Thus it need not be justified as a business necessity. Congress did not intend that Title VII lead to uniform hiring practices across an industry. So long as hiring policies do not discriminate, Title VII does not require their modification.

[36] We hold, not that all minority city drivers with three years' experience at city driving must be permitted to transfer, but only that they may not be excluded unless they fail to meet other qualifications that either have no disparate impact along racial or national-origin lines or that can be justified as essential for safety or efficiency. On remand the district court should monitor carefully the criteria used by ETMF to prevent minority city drivers from transferring to line driving jobs.[28]

To permit minority city drivers the opportunity to return to their "rightful place" in the road driver ranks, the plaintiff class should be divided into sub-classes, one for each terminal in the Texas-Southern Conference area where ETMF domiciles road drivers. ETMF's system of terminal-based responsibility for hiring and of domiciling road drivers only at certain terminals is not discriminatory, and we leave these practices intact. Still, we are not blind to the recognized mobility of

28. While the in-cab road test is undoubtedly a legitimate method for determining the qualifications of a driver, it may be subject to abuse unless the chances of a subjective judgment by the tester are minimized. See, e. g., United States v. Central Motor Lines, Inc., W.D.N.C.1971, 338 F.Supp. 532, 563. Moreover, a potential transferee who performs inadequately on this test should not be disqualified unless he cannot be expected to improve sufficiently given normal training.

today's minorities. See, e. g., Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 at 1371. We may not assume that blacks and Mexican-Americans who became city drivers at a terminal where road drivers were not domiciled would not have moved to a terminal where road drivers were domiciled had a road driver job been open to them. Therefore, those members of the class who now work in terminals where road drivers are not domiciled must be permitted to join the sub-class of their choice. In other words, they must be provided an opportunity to become road drivers at one of the terminals where ETMF domiciles road drivers. Black and Mexican-American city drivers at terminals where road drivers are domiciled should be placed in the sub-class corresponding to that terminal. We may assume that they are already at the terminal they would have chosen had road driver jobs been open to them in the past.

Within each sub-class, minority city drivers should be permitted the opportunity to transfer as jobs become vacant at that terminal. The minority city drivers should be ranked in the various sub-classes according to their "qualification dates", described below. The ranking should determine the order in which opportunities to transfer are awarded.

[37] Over objection at trial, the district court admitted evidence pertaining to the qualifications of the named plaintiffs to become road drivers. The court then found that Rodriguez, Perez, and Herrera were unqualified. In light of the fact that the company admitted by stipulation that it did not consider any of the plaintiffs for employment as road drivers, we believe that the district court's action was premature. The question with regard to the named plaintiffs was not whether they were qualified, but whether ETMF's failure to consider their applications was discriminatory. On remand, the district court should require ETMF to consider the plaintiffs for road driver positions as vacancies occur. The court should supervise carefully the standards used by ETMF to

determine whether the plaintiffs are in fact qualified, and should view with particular skepticism any reliance by ETMF on disciplinary actions taken by the company after the plaintiffs initiated their actions with the EEOC.

B. *Seniority Carryover*

[38] Members of the plaintiff class who transfer to the road must be permitted to take with them seniority for job bidding and lay off purposes. The question is "how much?" In general terms, the answer is that "how much seniority the transferee deserves should be determined by the date he would have transferred but for his employer's discrimination". Bing v. Roadway Express, Inc., 485 F.2d at 450. There is no way to arrive at such a date with exactitude, however, and some method for approximation is necessary.

In *Bing* we approved a "qualification date" formulation—the date a transferee had the experience necessary to qualify him for a road driving job. 485 F.2d at 451.[29] The *Bing* test represents a compromise between the trial court's determination in that case that seniority rights should date from when the transferees applied to become road drivers, and the remedy requested by the Government as amicus, that transferees should carry over full company seniority. This Court felt, on the one hand, that the application-date formulation of the district court failed "to account for the realities of entrenched employment discrimination", 485 F.2d at 451; the company

29. In this case the qualification date of a member of the plaintiff class of city drivers is the date when, in the employ of ETMF, the individual first accumulated three years combined road and city driving experience gained either with ETMF or with other organizations. If the individual already possessed such experience when hired by ETMF, of course, his qualification date will be the same as his company seniority date.

Similar to *Bing*, the straight qualification-date calculation must be modified to take account of that period from October 1969 to March 1971, during which ETMF did not hire any road drivers. The seniority of any member of the plaintiff class whose qualification date falls within the period when ETMF did no hiring must date from March 1970, when ETMF resumed hiring.

defendant's discriminatory practices discouraged city drivers from applying. On the other hand, the Government's theory of full seniority carryover would have given super-seniority to those transferees who were not qualified to be road drivers before they began working for the defendant. Until they were qualified, "discrimination could not have blocked their employment as road drivers". *Id.*

The *Bing* qualification-date formulation was rejected recently by a divided panel of the Sixth Circuit. In Thornton v. East Texas Motor Freight, 6 Cir. 1974, 497 F.2d 416, a case involving the same trucking company that is a defendant in the instant case, the Court affirmed the district court's grant of seniority carryover dating from six months after the transferee requested transfer or filed a charge with the EEOC. Although the Court distinguished *Bing* on the grounds that more charges were filed with the EEOC in *Thornton* (thus apparently showing that "silence and futility of protest" were less the norm), the Court also criticized the *Bing* rationale: "The rationale in *Bing* was that silence might be caused by a belief in the futility of a transfer request. That may be true, but also it may be caused by no desire to transfer." 497 F.2d at 421. The Court also noted that "there is something to be said for rewarding those drivers who protest and help to bring rights to a group of employees who have been victims of discrimination". 497 F.2d 420.

We are unpersuaded by these considerations. First, we think that the best indication whether a person desired transfer to the road in the past is reflected in whether he desires transfer now, so long as we do not create special incentives or disincentives that skew the balance. The qualification-date test of *Bing*, by taking into account experience requirements on the one hand and the effects of entrenched discrimination on the other, is as neutral as any we can envision. Second, the concern showed by the *Thornton* majority for rewarding those who help to bring rights to a group of employees was

adequately answered by Judge Phillips, dissenting in part: "Any such 'reward' should not be at the expense of the other victims of the discrimination. Title VII was enacted to protect *all* employees from unlawful discrimination. This is especially true where the discrimination intimidated the employees to such an extent that they felt it would be futile to request a transfer." 497 F.2d at 428. In short, we reaffirm the qualification-date formulation of Bing.[30]

C. *Back Pay*

The district court should consider the question of back pay, with particular reference to the guidelines laid down in Pettway v. American Cast Iron Pipe Co., 494 F.2d at 251–263; Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1375 1380; and Bing v. Roadway Express, Inc., 485 F.2d at 452–455. In these cases the criteria for the award of back pay, and the method of calculation, have been thoroughly analyzed. The most difficult question remaining before the district court will be the apportionment of the burden of paying any back pay awards among the three defendants. Consistent with the broad discretion awarded the district court on this question in Johnson v. Goodyear Tire & Rubber Co., 491 F.2d at 1382, we intimate no view to this question.

30. This Circuit recently required that transferees in a trucking case similar to this one be permitted use of "full company seniority" in their new positions. Franks v. Bowman Transportation Co., 5 Cir. 1974, 495 F.2d 398, 416. The Court emphasized, however, a critical difference between that case and *Bing*: "In [*Bing*], Roadway had a flat requirement of one year's experience for road drivers, so that the qualification date was easily calculable. To allow the use of company seniority before that date would have placed the discriminatee in a better position than he could have achieved without the discrimination. In this case, by contrast, Bowman had no rigid one-year experience requirement. It sometimes accepted OTR [over-the-road] trainees with little or no prior driving experience." *Id.* 495 F.2d at 417 n. 17. As in *Bing*, the qualification date in the instant case is easily calculable. The three-years experience requirement has been rigidly adhered to.

V.

The Consent Decree

On June 29, 1972, the United States filed a "pattern and practice"[31] suit in the Northern District of Texas against ETMF, the Teamsters International, and the International Association of Machinists and Aerospace workers, challenging nationwide essentially the same practices at issue in the instant private class action. February 19, 1974, approximately one month before we heard oral argument in the case before us, the parties to the Government's suit entered into a consent decree. The decree covered:

> A. Such black or Spanish-surnamed city drivers, hostlers, checkers and garage employees who are domiciled at a terminal where road drivers are presently domiciled or where road drivers have been, since July 2, 1965, domiciled under either ETMF or a predecessor company.
>
> B. Such persons who are incumbent city employees employed at a non-road driving terminal who have, since July 2, 1965, indicated a desire to transfer to the road.[32]

In addition to setting some standards for hiring and establishing hiring ratios, the decree established "transfer procedures". City drivers were to be afforded 30 days "to indicate an interest in transferring to the road driver classification at the terminal in which he is employed (if that terminal has an over-the-road operation) or at a terminal within the job market, or to a terminal of his choice (if the terminal at which he is employed has no over-the-road operation) . . . ." The issue of seniority rights was left for later resolution. The decree provided also that ETMF was to furnish a total of $175,000 as back pay compensation for members of the affected class nationwide. Persons accepting a portion of this settlement were to sign a release "stating that such designated portion is accepted in full and final settlement of all claims

31. See 42 U.S.C. § 2000e-6.

32. The decree also covered some named individuals.

for monetary compensation, back pay or any other type of relief against ETMF or any predecessor corporation based upon any pending litigation or other alleged discriminatory actions because of race or national origin occurring prior to the date such release is signed".

[39, 40] A judgment by consent binds the parties and those in privity with them. Seaboard Air Line Railroad Co. v. George F. McCourt Trucking, Inc., 5 Cir. 1960, 277 F.2d 593. Members of the plaintiff class in the present action were neither parties to the Government's suit, nor do they have interests in privity with the Government. See Williamson v. Bethlehem Steel Corp., 2 Cir. 1972, 468 F.2d 1201, 1203, cert. denied, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed. 390; *cf.* Trbovich v. United Mine Workers of America, 1972, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686.

We hold, therefore, that the consent decree does not operate as collateral estoppel to prohibit any members of the plaintiff class from participating in relief in this case. See also 1B J. Moore, Federal Practice ¶ 0.411[1] (2d ed. 1974). Those members of the plaintiff class who accept compensation under the consent decree and sign a release, of course, are bound by the terms of the release. But no other members of the plaintiff class lose any right to relief in the instant case.

We have chosen not to accord the consent decree any great weight in our outline of the relief to be awarded by the district court. First, the "affected class" awarded relief in the consent decree does not encompass an important segment of the plaintiffs' class here—black and Mexican-American city drivers at "non-road driving" terminals in the Texas-Southern Conference area who have not "indicated a desire to transfer to the road". The Government's remedy is thus based implicitly on the theory, one we reject, that the acceptance by a black or Mexican-American of a job as a city driver at a city-only terminal, at a time when no road positions were open to him, signifies a lack of interest in a road driver position. Rather, we have taken cognizance of both the mobility of the

modern work force and the reality of entrenched employment discrimination that makes a request to transfer a futile gesture. Second, private plaintiffs in class actions under Title VII and the United States in "pattern and practice" suits protect different interests: the Government protects general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members. United States v. Local No. 3, Operating Engineers, N.D.Calif.1972, 4 FEP Cases 1088, 1093. While the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution. Finally, we cannot ignore the possibility that, if we permit negotiated settlements by the Government to control the relief accorded in pending private actions against the same plaintiffs, private actions will be significantly discouraged. Such a result would have a deleterious effect on enforcement of Title VII and would not, in our opinion, be consistent with the intent of Congress.

We are not unmindful of the argument that by going beyond the relief awarded by the consent decree we may discourage defendants in "pattern and practice" suits from entering into settlements with the United States when a Title VII private class action is proceeding simultaneously against the same defendant. The court in *Local No. 3, Operating Engineers* expressed a similar concern: "If the United States cannot offer a final settlement in cases where a pattern and practice suit is proceeding simultaneously with a class action, then the Government's bargaining power will be severely reduced". 4 FEP Cases at 1093. Our worries are eased, however, as were those of the court in *Local No. 3, Operating Engineers*, by the Government's support of the broad class relief outlined in the opinion. As amicus curiae in this case, the EEOC has filed a post-argument brief arguing that "those who elect not to take under the consent decree, as well as

those who are not covered by the decree, should have an opportunity to pursue vindication of their rights through this private litigation".[33]

The case is reversed and remanded for proceedings consistent with this opinion.

33. Supplemental Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae 4.

Adm. Office, U.S. Courts-West Publishing Company, Saint Paul, Minn.

APPENDIX C

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 CAMP STREET
NEW ORLEANS, LA. 70130
TELEPHONE 504 589 6514

August 18, 1975

TO ALL COUNSEL OF RECORD

No. 73-2801 - Jesse Rodriguez, et al. vs. East Texas Motor Freight, et al.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition(s)* for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by Clara F. Sucke
Deputy Clerk

cc: Mr. Jim Heidelberg
Ms. Debra Millenson
Mr. Theo F. Weiss
Messrs. Richard C. Hotvedt
Harry A. Rissetto
Messrs. George E. Seay
William Strock
Messrs. Edward W. Penshorn
Bradford F. Miller
Messrs. G. Wm. Baab
L.N.D. Wells, Jr.
Hall Gillespie

*Filed by Local Union 657, Southern Conference of Teamsters and East Texas Motor Freight

BEST COPY AVAILABLE

APPENDIX D

The following stipulations were read into the record by Theo F. Weiss, Esquire, Attorney for the Defendant East Texas Motor Freight:

The parties stipulate (1) that the plaintiffs were employed at the San Antonio Terminal of East Texas Motor Freight without regard to their race, color or national origin.

THE COURT: That means, Mr. Weiss, the original employment?

MR. WEISS: Yes, sir, that's right, Your Honor. (2) The no-transfer rule of East Texas Motor Freight, that is, no-transfer between classifications which would include no-transfer for the city to road or road to city has been uniformly applied without regard to race, color or national origin.

(3) The standards and qualifications of East Texas Motor Freight for road drivers are not discriminatory.

(4) Except for one road driver employed by Valley Copper State Freight Line who was transferred from San Antonio immediately after the merger of Valley Copper State and East Texas Motor Freight, East Texas has never had any road drivers domiciled in San Antonio or at the San Antonio Terminal.

(5) That prior and subsequent to the effective date of Title 7 of the 1964 Civil Rights Act to the date that Jesse Rodriguez filed the charge of discrimination with the Equal Employment Opportunity Commission, East Texas Motor Freight had never employed a Negro or Mexican-American as a line driver in the State of Texas covered by the Southern Conference Area Supplemental Agreement.

(6) Except to being received and filed locally by the then terminal manager Sager in August, 1970, East Texas Motor Freight never considered the written applications for employment as road drivers of the three plaintiffs and Trinidad Gomez. Such applications were transmitted to the Dallas Corporate office of East Texas Motor Freight subsequently to the filing of the EEOC charges involved herein.

Now, (7) is a delineation or a statement of the contentions being made by the plaintiffs in this case, narrowed down, as we did in the other cases.

(7) The claim of discrimination of the plaintiffs is solely based upon the fact that after their original employment they have been "locked in" to the lower paying job of a city driver and denied the job as a line driver because of:

(a) The maintenance of separate seniority rosters for city drivers and line drivers.

(b) The fact that any city drivers regardless of their race, if they transferred from city driver classification to road driver classification loses his accumulated city seniority.

(c) The defendant, East Texas Motor Freight discouraged inquiries from plaintiffs concerning the qualifications and/or availability of line driver jobs.

(d) The fact that the defendant, East Texas Motor Freight, has always employed Anglo-White applicants as road drivers.

(e) That the company's policy in practice for recruiting line or road drivers has been based to a great extent on a word-of-mouth system since the company's line driver and supervisory terminal personnel are almost exclusively Anglo-White, such practice has

continued the alleged illegal exclusion of Mexican-American and Negroes as road drivers.

(8) That the only issue presently before the court pertaining to the company is whether the failure of the defendant, East Texas Motor Freight, to consider plaintiff's line driver applications constituted a violation of Title 7 and 42 USC Section 1981.

Supreme Court, U. S.
FILED
AUG 11 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
Petitioner,

v.

JESSE RODRIGUEZ, MODESTO HERRERA,
and SADRACH PEREZ,
Respondents.

BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,
Petitioner,

v.

JESSE RODRIGUEZ, MODESTO HERRERA,
and SADRACH PEREZ,
Respondents.

BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, dated November 25, 1974, is reported at 505 F.2d 40 and is reprinted in the Appendix hereto at page 68. The notice of the order on petition for rehearing is dated August 18, 1975, and appears in the Appendix hereto at page 112. The decision for the United States District Court for the Western District

of Texas, dated March 22, 1973, is reported at 6 CCH E.P.D. ¶ 8815 and is reprinted in the Appendix hereto at page 55.

JURISDICTION

Plaintiffs brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981 seeking relief for themselves and members of a class. The District Court found that the cause of action was inappropriate for a class action and that none of the Defendants had violated Title VII or Section 1981.

The judgment of the Court of Appeals reversing the District Court's decision was entered on November 25, 1974. Petitioner's timely Petition for Rehearing was denied on August 18, 1975. *Certiorari* was granted on May 24, 1976. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, absent a class action hearing or an equivalent opportunity to present evidence on the question of the appropriateness of the class, the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class.

2. Whether the Court of Appeals, consistent with due process, may ignore a pre-trial stipulation, and *sua sponte* make a finding of liability without affording the Defendant an opportunity to present evidence to the District Court.

3. Whether the Court of Appeals properly relied on undifferentiated statistical evidence in entering a finding of liability in favor of the Plaintiff class.

STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, (as amended) 42 U.S.C. § 2000e-2:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1870, 42 U.S.C. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Rule 23 of the Federal Rules of Civil Procedure:

> (a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or

defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect.to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; . . .*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. . . .

STATEMENT OF FACTS

East Texas Motor Freight (ETMF) is an interstate common carrier of general freight by motor truck. During the time period relevant to this litigation ETMF operated 52 terminals in 19 states (App. 162).[1] This litigation concerns ETMF operations in the State of Texas where ETMF had 21 terminals. ETMF locates most of its freight terminals in or near major cities served by ETMF. At these terminals, a shipper's freight is accumulated for dispatch to distant cities in the ETMF system and freight from other terminals is delivered for ultimate delivery to consignees in the metropolitan area served by that facility. ETMF employs two basic classifications of truck drivers; city drivers and over-the-road drivers. City drivers handle the pickup and delivery of freight within the metropolitan area served by the terminal at which they are employed. Over-the-road drivers transport freight long distances between ETMF ter-

[1] References to pages in the Joint Appendix hereto will be referred to as "App. —".

minals. City drivers are employed at virtually all terminals. Over-the-road drivers are normally employed or domiciled only at certain terminals, the location of which is a management decision based in large part on the volume of outbound freight generated at that terminal and the geographic location of the terminal in relation to other ETMF terminals (App. 170). For example, in the State of Texas during the relevant period, ETMF had 6 terminals that domiciled road drivers and 15 terminals that did not. On the other hand, ETMF had city drivers at virtually all terminals (App. 171).

Each terminal in the company's system is an independent profit center. Thus, each terminal maintains primary responsibility for hiring its own personnel. Although the corporate office in Dallas approves each applicant for employment, terminal management makes the affirmative decision to hire and assumes responsibility for that decision (App. 186-187). In order to preserve the profit-center concept of internal accountability, ETMF has a general policy prohibiting transfer between terminals[2] (App. 187-188). The rationale for this policy is that to allow employees to transfer from terminal to terminal would visit one manager's hiring mistake on the manager of another terminal. Furthermore, to allow a manager in one city to hire for employment at a terminal in another city dilutes hiring responsibility and the profit-center concept of internal accountability (App. 188).

ETMF's qualification for road drivers which had been at issue in this litigation were more stringent

[2] The company is required by its collective bargaining agreement to allow transfer in certain limited circumstances, such as in the event of layoff.

than for city drivers. Road drivers must be at least 27 years old and have three years of "immediate prior line-haul road experience." City drivers, on the other hand, must be at least 21 years old and have at least one year pickup and delivery experience (App. 178). City drivers and road drivers are covered by different supplemental agreements to the National Master Freight Agreement, an industry collective bargaining agreement (App. 331, 342). ETMF has a "no-transfer" policy prohibiting the transfer of drivers between the city and road driver classifications.[3] The stringent road driver qualifications and the "no-transfer" between job classifications policy were motivated by safety considerations. During the 1950's, ETMF's poor safety record had caused the ICC Department of Transportation to suspend ETMF's authority to haul certain classes of government freight and also to withhold additional route authority sought by ETMF. (App. 164, 179). These events led the employer to implement the stricter set of qualifications for road driver personnel referred to, *supra* (App. 176-178). In order to maintain these high standards, the no-transfer rule between classifications was imposed. (App. 167).

The named Plaintiffs applied and were employed at ETMF's San Antonio terminal between 1959 and 1965. (App. 56, ¶ 3). The San Antonio terminal employs only city drivers (App. 173). ETMF has never actively employed road drivers at that location. The

[3] For 30 days in January and February of 1972, to ease morale problems among its city drivers, ETMF relaxed its "no-transfer" policy at selected road domiciles and permitted city drivers to transfer to the road driver classification, providing they could meet the road driver qualifications (App. 188).

named Plaintiffs' claim turns on written inquiries for employment as road drivers submitted to the San Antonio terminal manager in August, 1970. At that time, ETMF was hiring no new road drivers because of its contractual obligation to recall drivers on layoff status before hiring persons from outside the classification. When the company resumed hiring into the road driver classification in March, 1971, Plaintiffs were not considered as applicants because of the company's no transfer policies and because they had expressed their interest in the jobs at the San Antonio terminal which was not a road domicile. (App. 191).

Furthermore, none of the Plaintiff-Respondents satisfied the company's over-the-road driver requirements. Jesse Rodriguez had no road driver experience and, at the time of his inquiry concerning road jobs, had been involved in three on-the-job accidents (App. 60, Finding 20). At the time of their inquiries, Messrs. Herrera and Perez had no prior road driving experience. Additionally, Mr. Herrera had been involved in on-the-job accidents. (App. 61, Findings 21, 22).

The three named Plaintiffs filed written charges with the Equal Employment Opportunity Commission, complaining that the policies of ETMF, Local 657 of the Teamsters Union, and the Southern Conference of Teamsters discriminated against Blacks and Mexican-Americans. After receipt of their "right to sue" letters in October, 1971, Plaintiffs filed an action alleging discrimination against themselves and members of the class described as follows:

> That the appropriate class should consist of all Defendant East Texas Motor Freight's Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas. Additionally, that such class should properly be composed of all Mexican-American and Black applicants for line drivers positions with East Texas Motor Freight included in the above by the Southern Conference of Teamsters from July 2, 1975, to present. (App. 15, ¶ 12).

Despite this initial characterization of the case as a class action, the parties stipulated that the only issue at trial would be ETMF's liability to the individual Plaintiffs. (App. 113; 115, ¶ 8). Following trial, the United States District Court held that the claims of the individual Plaintiffs were without merit and that the litigation was not properly maintained as a class action. (App. 55, 66). On appeal, the Court of Appeals reversed the decision of the District Court and held that the case was appropriate as a class action. (App. 68, 83). The Appellate Court held that the appropriate class was that which Plaintiffs had styled:

> All of East Texas Motor Freight's Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and the Southern Conference of Teamsters covering the State of Texas.[4] (App. 83).

The Court of Appeals made this finding notwithstanding that the Plaintiffs had offered no proof concerning the appropriateness of a Plaintiff class. The Court

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[4] The Court of Appeals affirmed the District Court's dismissal of the class claims of Black and Mexican-American applicants for employment as road drivers at ETMF's Texas terminals because no proof had been offered concerning liability to that class. (App. 83).

affirmed the District Court's dismissal of the cause as to "all Mexican-American and Black applicants for line driver positions" which Plaintiffs alleged to represent. The Court of Appeals held, further, that ETMF was liable to members of the Plaintiff class and that the named Plaintiffs were entitled to recovery by virtue of their being members of the class. (App. 97).

SUMMARY OF THE ARGUMENT

The decision by the Court of Appeals violates Rule 23 of the Federal Rules of Civil Procedure and disrupts the orderly and fair development of judicial procedures in lawsuits brought under Title VII of the Civil Rights Act of 1964. The Court of Appeals ignored the manner in which the parties and the District Court had tried the lawsuit and substituted its precedential preconceptions for what actually happened between the advocates during the proceedings. The appellate court acted precipitously on the basis of impressions it had formed in other appellate proceedings involving different facts and different parties.

The Court of Appeals improperly reversed the District Court's dismissal of the Plaintiffs' class action claims. The Plaintiffs, by electing not to seek a class determination, failed to prosecute effectively the litigation as a class action, and further, entered into a binding stipulation at the commencement of trial that the only issue before the District Court was the claims of the individual Plaintiffs. On the basis of these factors and the Plaintiffs' presentation of their case, the District Court concluded that the class claims should be dismissed rather than decided. The Court of Appeals overrode the District Court's exercise of its discretion under Rule 23 and erroneously held that the

Plaintiffs were not required to move the District Court to have their claims certified as a class action, thus improperly allocating that burden to the District Court. The orderly judicial administration of class actions requires that the burden of crystallizing the class action question rests with the Plaintiffs, not with the District Court or the Defendants. The Court of Appeals compounded its mistake by *sua sponte* certifying the litigation as a class action and overstepped the boundaries of the appellate process by superimposing a class action form on a trial conducted as an individual action.

The defects in the substantive approach adopted by the Court of Appeals in reviewing the merits of the Plaintiff's Title VII claims are as serious and far-reaching as the procedural errors committed by the Court of Appeals. The Appellate Court erred in holding that a Plaintiff class can establish a *prima facie* case of employment discrimination without presenting any evidence that the Defendant employer discriminated against the members of Plaintiff class. The Court of Appeals, disregarding the binding stipulation entered into by the parties that the Plaintiffs were employed at the San Antonio terminal of East Texas Motor Freight without regard to their race, color or national origin, inferred that Defendant's employment practices were discriminatory from mere general employment statistics. Such statistics are not sufficient to shift the burden to the employer to establish that it did not discriminate against the Plaintiff class without further proof establishing that the Plaintiff class is included within the resulting evidentiary inference. The affirmative burden of establishing that the members of the Plaintiff class were victims of dis-

crimination must rest with the Plaintiffs. To do otherwise is to reverse the adversary process and to allocate to the Defendant the burden of disproving the Plaintiff's unsupported allegation of discrimination.

By relying on general employment statistics as the sole component of a *prima facie* case, the Court of Appeals ignored the relevant-labor-market concept which is a critical factor in establishing a nexus between the alleged discrimination and the claims of the plaintiff class. If, as here, members of the plaintiff class were not present in the geographical area, or if there is no showing that ETMF hired others when qualified members of the class were seeking employment, then a statistical imbalance raises no inference that the employer had unlawfully discriminated against the persons in the plaintiff class.

The alleged racial and ethnic imbalance of the ETMF's road driver workforce is presently the subject of intensive remedial hiring procedures pursuant to the terms of a partial consent decree agreed to by the United States and East Texas Motor Freight in an independent court proceeding under Title VII. However, the mere existence of this imbalance alone is insufficient to establish liability to the class certified by the Court of Appeals in this case.

The decision of the District Court that the individual claims of the named Plaintiffs lacked merit is well supported both legally and factually and, like the District Court's dismissal of the class claims, should be reinstated by the Court. However, even if the District Court erred and the Plaintiffs did not abandon the class claims, the Court of Appeals should have remanded the class action question to the District Court

to determine initially whether the litigation was an appropriate class action; to define the scope of the class; and to establish an evidentiary record with respect to the Plaintiffs class' claims of liability. The Court of Appeals, relying on dissimilar precedent and its own preconceived notions of socio-demographic principles, succumbed to the pitfalls that are created when an appellate court oversteps its proper function and assumes, without the benefit of an adversary proceeding, the role of a trial court.

ARGUMENT

I. THE COURT OF APPEALS DISREGARDED THE PROCEDURES OF RULE 23 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND IMPROPERLY CERTIFIED THE PLAINTIFF CLASS AB INITIO.

A. The Court of Appeals' Appellate Certification of the Litigation as a Class Action Was Improper Because Rule 23 of the Federal Rules of Civil Procedure Requires that a Class Action Determination Be Made by the District Court Prior to a Decision on the Merits.

The procedural profile of the litigation at the time it was submitted to the Court of Appeals is relevant in understanding the error in that court's treatment of the class action question. The Plaintiffs, notwithstanding the class action allegations in the complaint, did not request a class determination by the District Court pursuant to Rule 23(c) of the Federal Rules of Civil Procedure. ETMF, in its answer as well as in the pretrial pleadings, took the position that a class action was inappropriate. (App. 32 ¶ 2, 34 ¶ 4). Immediately prior to the trial the parties entered into a restrictive stipulation which provided that "the only issue presently before the Court pertaining to the Company is whether the failure of the defendant, East Texas Motor

Freight, to consider plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. Section 1981." (App. 113; 115 ¶ 8). At the trial itself only one colloquy between the Court and counsel touched on the class action question but did not result in a determination as to the nature of the litigation. (App. 128-130). In fact, prior to the District Court's decision on the merits, the class action question was not the subject of argument by counsel, the submission of facts or consideration by the trial court.

In its decision on the merits, the District Court concluded that the case was not a proper one for class action, and, thus, dismissed the class claims. (App. 66 ¶ 2). This conclusion was based on a finding that the Plaintiffs had not moved for an order pursuant to Rule 23(c)(1) and had not presented any proof as to liability and damages to the class. (App. 65, ¶¶ 31, 32). On appeal, the Plaintiffs conceded that the District Court had not tried the case as a class action and they urged that the Court of Appeals remand the case to allow the District Court to make the determination pursuant to Rule 23(c)(1). (Appellants' Initial Brief to the Court of Appeals at 48).

Despite this procedural history, the Court of Appeals decided, *sua sponte*, that the case was appropriate as a class action and that the class was "all East Texas Motor Freight Mexican-American and Black city drivers included in the collective bargaining agreement entered into between East Texas Motor Freight and Southern Conference of Teamsters covering the State of Texas." (App. 83). This class was substantially the same as the class which the Plaintiffs alleged to represent in their complaint. (App. 15 ¶ 12).

The Fifth Circuit's decision on the class action issue is materially inconsistent with the language and the intent of Rule 23 of the Federal Rules of Civil Procedure. The District Court did not abuse its discretion when it concluded that the Plaintiffs' cause of action "is not a proper one for a class action" (App. 66 ¶ 2) because the Plaintiffs "confined the evidence, arguments and post trial brief to the individual claims of the named plaintiffs." (App. 61 ¶ 32). The District Court's dismissal of the class action claims was an appropriate response to the procedural posture adopted by the Plaintiffs. Alternatively, if the Court should agree with the Court of Appeals and conclude that the trial court erred in dismissing the class claims, it is ETMF's position that the appellate court acted incorrectly when it certified the litigation as a class action and made an affirmative finding of liability on behalf of the plaintiff class.[5]

The Court of Appeals was apparently motivated to adjudicate the litigation as a class action by its assumption that it had been tried as such in the District Court. (App. 81). As support for this supposition, the Court of Appeals looked to the inconclusive colloquy

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[5] The Plaintiffs had also alleged to represent a class of Mexican-American and Black applicants for road driver positions at ETMF's Texas terminals. The Court of Appeals declined to include these persons in the class because "the Plaintiffs never pursued the action on behalf of these individuals." (App. 83). It is ETMF's contention that the Plaintiffs similarly abandoned all other class-related claims, thus, the Fifth Circuit should have affirmed the holding of the District Court that the case was not appropriate for a class action. It is ETMF's position that the decision of the Court of Appeals should be affirmed insofar as it sustained the earlier judgment of the District Court with respect to the Plaintiffs' applicant class.

between counsel and the Court, and certain road driver and city driver employment statistics. In concluding that "the Plaintiffs continued to proceed as a class action" (App. 82), the Court of Appeals ignored the parties' pretrial stipulation, the overall body of evidence submitted to the District Court, and the Plaintiffs' candid admission in their brief to the Court of Appeals that "[t]he class action has never been considered by the lower court and, therefore, its dismissal must be overturned." (Appellants Initial Brief to the Court of Appeals, p. 48).

Because the District Court's dismissal of the class action was premised on a finding that the Plaintiff had neither moved for an order nor presented proof and thereby had abandoned the class, the trial court did not have the occasion to receive evidence or hear argument by the parties directed to the class action question. Therefore, the record does not contain the basis upon which a decision on either the appropriateness of a class action or the liability to a class may be made. For that reason, it was improper for the Court of Appeals to assume the role of a trial judge and to make an initial class action determination on the basis of a trial record which had been developed by both parties as an individual rather than a class action. The Court of Appeals decision short-circuited the procedures mandated by Rule 23 and deprived the defendant of its right to submit evidence and make legal arguments with respect to the class determination as well as the question of the Defendant's liability to the putative class.

The proper procedural vehicle for qualifying the litigation as a class action was available to the Plaintiffs within Rule 23. Their failure to move for an order certifying the case as a class action raises a

strong inference that they elected to proceed individually. *See Yulio* v. *Moore McCormick Lines, Inc.,* 387 F.Supp. 872 (S.D.N.Y. 1975).

The Plaintiffs in a class action bear the burden of proving that their case meets the requirements of Rule 23(a) and (b). *Rossin* v. *Southern Union Gas Co.,* 472 F.2d 707, 712 (10th Cir. 1973). Thus, in *Glodgett* v. *Betit*, 368 F.Supp. 211 (D. Vt. 1973), *aff'd sub nom. Philbrook* v. *Glodgett*, 421 U.S. 707 (1975), the three-judge District Court, before ruling on cross motions for summary judgment, dismissed the class aspects of the case, stating:

> An action is not maintainable as a class action merely because it is so designated in the pleadings. *Cash* v. *Swifton Land Corporation*, 434 F. 2d 569, 571 (6th Cir. 1970); *In re Swan-Finch Oil Corporation,* 279 F.Supp. 386, 391 (S.D.N.Y. 1967). To the contrary, the plaintiffs in a purported class action bear the burden of establishing that their action meets the prerequisities of Rule 23. *Rossin* v. *Southern Union Gas Company* 472 F.2d 707, 712 (10th Cir. 1973); *Poindexter* v. *Teubert,* 462 F.2d 1096, 1097 (4th Cir. 1972); *Daye* v. *Commonwealth of Pennsylvania,* 344 F.Supp. 1337, 1342 (E.D. Pa. 1972); *Clark* v. *Thompson,* 206 F.Supp. 539, 542 (S. D. Miss. 1962), *aff'd* 313 F.2d 637 (5th Cir. 1963), *cert. denied,* 375 U.S. 951; 84 S.Ct. 440, 11 L.Ed.2d 312 (1963); *Free World Foreign Cars, Inc.,* v. *Alfa Romeo,* 55 F.R.D. 26, 29 (S.D.N.Y. 1972); *see Demarco* v. *Edens,* 390 F.2d 836, 845 (2d Cir. 1968); *Phillips* v. *Sherman,* 197 F.Supp. 866, 869 (N.D.N.Y. 1961). This burden imposes upon the plaintiffs in a purported class action responsibility to move for a formal certification of their class action by the court under Rule 23(c)(1). *Herbst* v. *Able,* 45 F.R.D. 451, 453 (S.D.N.Y.

1968); *Zeigler* v. *Gibraltar Life Insurance Company* 43 F.R.D. 169, 170 (D. S.D. 1967).

* * *

In moving for summary judgment without having sought a formal certification of this action as a class action, *the plaintiffs leave us no choice but to dismiss the class aspects of this suit on the ground that the plaintiffs have failed to meet their burden to prove that the action meets the prerequisites of Rule 23. Id.* at 214 (emphasis added).

In this case as well, the Plaintiffs presented no evidence concerning the applicability of Rule 23 beyond merely alleging the existence of the class in their pleadings and making reference to discrimination against "Mexican-Americans and Blacks" in their proposed pretrial order. Plaintiffs' counsel has not attempted to carry their burden under Rule 23, and the District Court in its findings Nos. 31 and 32 clearly states this. (App. 66)

The Court of Appeals held that the class representatives have no obligation to move for a class action determination and that "that responsibility falls to the [District] Court." (App. 78). This interpretation of Rule 23 by the Court of Appeals must be rejected because it frustrates the intent of the 1966 amendments to Rule 23 and because it does violence to the well developed principal of jurisprudence that the Plaintiff bears responsibility for proving the allegations in his complaint.

By exempting the Plaintiffs from the obligation to seek class certification prior to trial, the Court of Appeals revived the abuse of "one-way intervention" which the 1966 amendments to Rule 23 sought to eliminate. In *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), the Court stated:

> Under Rule 23 as it stood prior to its extensive amendment in 1966, 383 U.S. 1047-1050, a so-called "spurious" class action could be maintained when "the character of the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." The Rule, however, contains no mechanism for determining at any point in advance of final judgment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, "[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigaton, whch might or might not be accepted." 3B J. Moore, Federal Practice § 23.10[1], p. 23-2603 (2d ed.). *Cf. Snyder* v. *Harris*, 394 U.S. 332, 335; *Zahn* v. *International Paper Co., ante* at 296, n. 6. A recurrent source of abuse under the former Rule lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interest. If the evidence at trial made their prospective position as an actual class member appear weak, or if determination precluded the possibility of a favorable determination, such putative members of the class that chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called 'one-way intervention'—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves *to the binding effect of an unfavorable one.* The 1966 amendments were de-

> signed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments. *Id.* at 545-47. (footnotes omitted, emphasis added).

See also Eisen v. *Carlisle & Jacqueline,* 417 U.S. 156, 176-77 (1974); *Peritz* v. *Liberty Loan Co.,* 523 F.2d 349 (7th Cir. 1975).

These considerations are clearly applicable to class actions brought under Title VII. As then Judge Stevens noted in his dissent in *Sprogis* v. *United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971):

> At a minimum, this rule requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or backpay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair. *Id.* at 1207 (footnote omitted).

In its effect, the action in this case by the Court of Appeals is indistinguishable from the "one-way intervention" which the amended Rule 23 was designed to prevent. The Defendant, having lost on the merits in the eyes of the Fifth Circuit Court of Appeals, is liable to the class. However, it is simply inconceivable that the Court of Appeals, had it found Defendant's practices to be nondiscriminatory, would have taken similar steps to bind all members of the alleged class to that determination. The trial court, in dismissing the class action, did not bind the members of the purported class on the merits and, under its decision, unnamed class

members alleging a cause of action might subsequently bring individual or class action against the Defendants.

The burden for obtaining an early adjudication of the "class action" allegations cannot be left in limbo. Among the Plaintiffs, the Defendant, and the Court, the obligation is most fairly ascribed to the Plaintiffs because they initiated the class action and agreed to represent absent individuals in the litigation. The character of a particular cause of action is determined from the outset by the Plaintiffs. The allegations in the complaint inform the Defendant and the trial court whether the Plaintiffs are seeking to proceed individually or in a representative capacity. By voluntarily undertaking a representative status, the Plaintiffs assume the responsibilities of proceeding in a manner consistent with Rule 23. One of those obligations is to secure judicial ratification of that status from the District Court "by order". The Court of Appeals' decision, insofar as it holds that the Plaintiffs are under no obligation to seek certification, effectively forces the Defendant to seek a judicial determination of the class or face the peril of a subsequent court determination that he is liable for injunctive relief and back pay to some undetermined and undefined Plaintiff class. Conversely, the Plaintiff, who assumed class representative status with the concomitant duty to represent the class, is free to do nothing, secure in the knowledge that this inaction will result in no prejudice to his claim.[6]

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[6] In this litigation, evidence was introduced by the Defendant conclusively establishing that the three named Plaintiffs were unqualified as road drivers and the District Court so found. The Plaintiffs made no effort to seek class certification. As a result of this inaction, the Court of Appeals certified the case as a

To assign the obligation to initiate certification proceedings to the District Court is inappropriate because the Court functions in an adversary context and ought not be required to initiate the submission of a question that it will then be required to decide. Finally, it would be unfair to require the Defendant to move for a certification determination because it did not voluntarily offer to defend the class action claim; that status was thrust upon it by the Plaintiffs' complaint. The District Court judge was acting within his discretion in dismissing the class action aspects of this case and that determination should not be disturbed unless the party challenging it can show an abuse of discretion. *Clark* v. *Watchie,* 513 F.2d 994, 1000 (9th Cir. 1975); *Bermudas* v. *U. S. Department of Agriculture,* 490 F.2d 718 725 (D.C. Cir. 1973), *cert. denied sub nom. Butts* v. *Bermudas,* 414 U.S. 1104 (1974); *Wilcox* v. *Commerce Bank of Kansas City,* 474 F.2d 336, 344 (10th Cir. 1973); *Castro* v. *Beecher,* 459 F.2d 725, 732 (1st Cir. 1972); *Hackett* v. *General Host Corp.,* 455 F.2d 618, 626 (3d Cir. 1972); *Gold Strike Stamp Co.* v. *Christensen,* 436 F.2d 791, 792-93 (10th Cir. 1970); *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F.2d 295, 298 (2d Cir. 1969).

Rule 23(c)(1) of the Federal Rules of Civil Procedure provides as follows:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained An order under this subdivision may be conditional and may be altered or amended before the decision on the merits.

This directive is not addressed to the Court of Appeals but to the federal District Court. The language of the Rule, allowing as it does alteration and amendment before the decision on the merits, clearly contemplates conditional certification well before the decision on the merits and impliedly prohibits certification thereafter. It is important that the District Court make an early certification decision because the Court's ruling defines the scope of the litigation and the issues with respect to which the parties must prepare and present evidence. If the Court of Appeals is permitted to inform the parties for the first time after the close of the record that they were litigating a class action, both the plaintiffs and the defendants will be deprived of an effective opportunity to participate in the litigation in a meaningful way. The Manual for Complex Litigation § 1.40 (2d ed. 1975) contains the following discussion:

> The mandatory language of Rule 23(c)(1) is based upon sound and urgent practical considerations. If the determination whether the action should proceed as a class action is delayed, serious injustices may result, and avoidable procedural difficulties of great magnitude may ensue. For example, persons having notice of the class action request, thinking themselves represented in the proposed class action, may, in reliance on the requested class action, fail to make a claim for relief until the statute of limitations has run. If the class action request is belatedly denied, these persons may have lost their right to sue to protect their individual interests. If discovery proceeds in

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class action and accordingly vacated as "premature" the District Court's finding that the Plaintiffs were individually not qualified. Thus, the Plaintiffs' inaction not only did not prejudice them but served as a vehicle for obtaining appellate resuscitation of their individual claims.

the action while a class action request remains undetermined, and the court later determines that the action may be so maintained, the discovery may be unusable because of the absence of parties and absence of representation of the members of the class. *Id.* at § 1.40.

The Manual recommends that the class action determination be made no later than the second pretrial conference.[7] *Id.* at § 2.10. This approach is consistent with the Federal Rules of Civil Procedure which are designed to "narrow and clarify" the basic issues and to provide the parties and, therefore, the District Court with facts relative to those issues. In *Hickman* v. *Taylor,* 329 U.S. 495 (1947) the Court said of the rules:

> Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Id.* at 501 (footnote omitted).

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[7] Indeed the necessity for early determination of the class claims is so important that the following federal district courts have promulgated rules providing specific time limits within which a party must move for class certification: District of Columbia, Rule 1-13 (90 days after suit commenced); Southern District of New York, Civil Rule 11A(c) (60 days); Southern District of Ohio, Rule 3.9.3 (90 days); Eastern District of Louisiana, Rule 2.12(c) (90 days); Eastern District of Pennsylvania, Rule 45(c) (90 days); Middle District of Pennsylvania, Rule 701.07(c) (90 days); Western District of Pennsylvania, Rule 34(c) (60 days); Rhode Island, Rule 30(c) (60 days); Vermont, Rule 11(3) (90 days); Western District of Washington, CR 23(3) (90 days); Southern District of Florida, Rule 19A.3 (90 days); Northern District of Georgia, Rule 221.13 (90 days); Southern District of Indiana, Rule 7(b) (90 days).

See Frankel, *Some Preliminary Observations Concerning Civil Rule 23,* 43 F.R.D. 39, 41.

Consistent with this principle, the parties in this case stipulated at the beginning of trial that there was but one issue to be determined:

> That the only issue presently before the Court pertaining to the company is whether the failure of the Defendant, East Texas Motor Freight, to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C. § 1981. (App. 113; 115 ¶ 8)

The pretrial stipulation molded the order and nature of the evidence adduced by the Defendant Petitioners (and presumably by the Respondents)[8] in the ensuing trial. As a consequence, the Defendants concentrated their defense on the lack of qualifications of the three named Plaintiffs under Defendant ETMF's standards, stipulated as nondiscriminatory, on the reasonable assumption that a Plaintiff in a Title VII action must prove that he was qualified for the job which was denied him for allegedly discriminatory reasons. *Cf. McDonnell Douglas* v. *Green,* 411 U.S. 792, 802 (1973).

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[8] Clearly, the Plaintiffs-Respondents also believed that the trial was directed solely to the liability of Defendants to the individual Plaintiffs and, thus, stated in their brief to the Court of Appeals that:

> The position of the Plaintiffs with respect to dismissal of the class action is that the dismissal was erroneous since it had been agreed that the singular issue for trial related only to the company's failure to consider the road applications. Appellant's Initial Brief, 46.

In light of that stipulation, they argued:

> The class action has never been considered by the lower court and, therefore, its dismissal must be overturned. *Id.* at 48.

Thus, they requested that the cause be reversed and remanded to the District Court "for consideration of the class action allegations." *Id.*

In making the class action determination during the appellate stage of the litigation, the Court of Appeals apparently followed its earlier decision in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973) where the Court of Appeals approved a class action award entered without a Rule 23(c)(1) determination. In *Bing* the record supported the finding that the parties and trial court had assumed that the litigation was a class action. Notwithstanding this unanimity with respect to the scope of action, the *Bing* decision has been the object of critical scholarly commentary:

> The decision should not be read too broadly, however, since in that case the court took note of the fact that the complaint alleged discrimination against the class, class relief was sought, no objection was made to the class nature of the action and class relief was given. The better general rule is that the court cannot simply award class relief after adjudicating an individual claim. Wright & Miller, *Federal Practice and Procedure*, § 1754 (Supp. 1976) (footnote omitted).

Other courts of appeals have heeded Professor Wright's warning. Therefore, in *Jackson* v. *Lynn*, 506 F.2d 233 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia said:

> The record contains neither a certificate or any showing that the district court agreed to hear this case as a class action, nor any judicial pronouncement to define the scope of the class. Rule 23(c)(1), F.R.Civ.P., provides for a determination by order of the district court whether an action brought as a class action may be so maintained. Courts have treated an affirmative order under that Rule as a prerequisite to class action maintenance whether or not the defendant challenges

> the class action allegation. *E.g., Dorfmann* v. *Boozer*, 1969, 134 U.S.App.D.C. 272, 414 F.2d 1168, 1171, n. 8; *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974). Thus, this court may not consider this appeal as a class action, and may reach issues only to the extent that the named plaintiffs are affected. *Id.* at 236.

Accord, Case & Co., Inc. v. *Board of Trade of City of Chicago*, 523 F.2d 355, 360 (7th Cir. 1975).

In *Indianapolis School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975) (*per curiam*), the Court ordered the case vacated as moot when the named Plaintiffs graduated from high school because it had never been formally certified as a class action under Rule 23(c)(1) and, thus, there was no present case or controversy. *Id.* at 130. The Court so held over the vigorous dissent of Justice Douglas who said:

> [T]he absence of such a written order is too slender a reed to support a holding of mootness, particularly in the face of the uncontrovertible evidence that certification was intended and did, in fact, take place. *Id.* at 131.

The Court regarded the existence of a written order by the District Court judge prior to a decision on the merits as an absolute prerequisite to the maintenance of a class action brought under Subdivisions b(1) and b(2) of Rule 23 in *Baxter* v. *Palmigiano*, — U.S. —, 44 U.S.L.W. 4487 (U.S. Apr. 20, 1976). The Court said:

> The District Court treated this suit as a class action but did not certify the action as a class action within the contemplation of Rules 23(c)(1) and 23(c)(3), Federal Rules of Civil Procedure. Without such certification and identification of the

class, the action is not properly a class action. *Indianapolis School Comm'rs.* v. *Jacobs,* 420 U.S. 128 (1975). *Id.* at 4488, n. 1 (citation omitted).

The absence of such an order in this case deprived the Court of Appeals of the jurisdiction to consider the question of liability to the class. The imposition of liability to members of the purported class on a record directed to the issue of individual liability without affording the Defendant the opportunity to present evidence or legal argument in its defense, constitutes a violation of "the immutable principle of natural justice, that no man's right should be prejudiced by the judgment or decree of a court, without opportunity of defending the right." *Hollingsworth* v. *Barbour,* 4 Peters 466, 475 (1830).

On the basis of these considerations, ETMF respectfully urges the Court to find that the District Court did not abuse its discretion when it concluded that the Plaintiffs had abandoned their class action claims, both as to applicants for line driver positions and as to city drivers, by failing to move for an order and by not offering proof on the class claims. As the Court has recently reaffirmed, the federal courts must follow the requirements of Rule 23 even though adherence may in effect deny the Plaintiff the opportunity to pursue his claim. *Eisen* v. *Carlisle & Jacqueline, supra.* The named Plaintiffs have had an opportunity to litigate their claims, and reinstatement of the District Court's dismissal of the entire class action is proper. In the alternative, if the Court should conclude that the District Court abused its discretion in finding that the Plaintiffs abandoned their claim and made no showing as to the class, the Court should affirm the Court of Appeals' finding of abandonment of the class action

as to applicants and remand this matter to the District Court for a class determination as to city drivers and retrial thereof. At the very least, the Plaintiffs' inaction and the pretrial stipulation (on which Defendants and the District Court properly relied) resulted in manifest confusion with respect to the status of the litigation. For this reason, it was patently unfair for the Court of Appeals to conclude that the parties litigated this case as a class action when both parties have averred to the contrary, and the Court of Appeals, by its own characterization, conceded that "the Plaintiffs concentrated at trial on the individual claims of the named Plaintiffs." (App. 82). Even if the Court of Appeals properly invested the District Court with the ultimate responsibility to make a class action determination, there is no reason to penalize the Defendants for the District Court's breach of that duty by precluding them from introducing evidence and submitting argument on the class action question and the issue of liability to the plaintiff class.

B. The Court of Appeals Erroneously Exempted the Plaintiffs from the Requirements of Rule 23 of the Federal Rules of Civil Procedure.

In determining that this case was an appropriate class action, the Court of Appeals made no factual inquiry to determine whether the litigation met the prerequisites of Rule 23(a), but merely concluded:

> There is no serious dispute that the Plaintiffs here have satisfied the three criteria in Rule 23(a). The class clearly meets the requirements that the members be so numerous that joinder would be impractical, that there are common questions of law and fact, and that the claims and defenses of the representative parties are typical (App. 79).

The Court of Appeals statement that there is no dispute about the Plaintiffs' compliance with the criteria of Rule 23(a) is simply erroneous. ETMF in its answer and pretrial statement challenged the appropriateness of the Plaintiffs' class allegations (App. 32 ¶ 2, 34 ¶ 2). A formal dispute on the record of this litigation did not crystallize because the Plaintiffs elected not to move for class certification and stipulated that the only issue before the Court at trial involved their individual claims.[9] However, ETMF's challenge to the class allegation remained undecided and was improperly ignored by the Court of Appeals when it determined that there was no serious dispute about the appropriateness of the plaintiff class. The appellate court's comment about there being "no serious dispute" (App. 79), like its later statement that the litigation was "completed as a class action" (App. 81) is nothing more than camouflage for the fact that it was making a determination that should have been the subject of proceedings in the District Court. Under these circumstances the Court of Appeals decision to decide the class issues *sua sponte* was tantamount to waiving a factual analysis of the Rule 23(a) criteria.

The court rationalized this novel procedure by superimposing a legal premise that "suits brought under [Title VII and 42 USC § 1981] are inherently class suits". (App. 78). However, nothing in Rule 23, in Title VII nor in Section 1981 supports such an interpretation. The Advisory Committee's Note to the 1966 amendments to Rule 23 comments that the Committee considered Rule 23(b)(2) to be especially appropriate in civil rights cases. But, nothing in the text of Rule

[9] The binding effect of this stipulation is treated in point III *infra*.

23(b)(2) or in the Advisory Committee's Notes indicates that Rule 23(b)(2) class actions should be exempt from the strictures of Rule 23(a). On the contrary, the plain language of Rule 23 requires that *all* class actions meet all of the prerequisities of Rule 23(a); only then will the trial court determine whether the case falls within one of the three subdivisions of Rule 23(b). See *Taylor* v. *Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975). Title VII of the Civil Rights Act was passed prior to the revision of the Federal Rules of Civil Procedure which are here in issue. Had the drafters of Rule 23 intended that Title VII cases be exempt from the requirements of Rule 23(a), they could have done so. They did not. Rather, the text of Rule 23(b) plainly states:

> *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and *in addition:* [one of the three subdivisions of Rule 23(b) is applicable]. (emphasis added).

Thus, the Rule does not contemplate District Court inquiry into whether a case is maintainable under Rule 23(b)(2) until the Plaintiff has affirmatively established that all of the prerequisites of Rule 23(a) have been met.

It is also clear from the legislative history of the 1972 amendments to Title VII that Congress intended that the requisites of Rule 23 continue to apply to actions brought under Title VII. The House of Representatives' bill included a provision prohibiting the use of class actions in Title VII suits. The Joint Conference Committee rejected that provision and stated:

> In establishing the enforcement provisions under this subsection and in Subsection 706(f) gener-

> ally, it is not intended that any of the provisions contained therein are designed to effect the present use of class action lawsuits under Title VII *in conjunction with Rule 23 of the Federal Rules of Civil Procedure* (emphasis added). *Legislative History of the Equal Employment Opportunity Act of 1972* at 1773.

Thus, the legislative history of the most recent amendments to Title VII specifically rejects the notion that Rule 23 should be liberalized or ignored in cases brought under it. Judge Godbold pointed out in his specially concurring opinion in *Johnson* v. *Georgia Highway Express,* 417 F.2d 1122 (5th Cir. 1969) that an overly liberal interpretation of Rule 23 in Title VII cases not only places an unfair burden upon the defendant who must defend challenges to a variety of practices at distinct geographical locations, but also prejudices the rights of individual class members who would be bound by the *res judicata* effect if the Plaintiff failed to prove his case. *Id.* at 1125-27. *See generally,* Note, *Collateral Attack on the Binding Effect of Class Action Judgment,* 87 Harv. L. Rev. 589 (1974).

As the Court said in *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964):

> The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. *Id.* at 121.

The decision by the Court of Appeals to adjudicate the question of liability to the Plaintiff class resulted in the *de facto* certification of an inappropriate Plaintiff class. Even assuming *arguendo* that all Title VII actions are class actions, the Court of Appeals preemptory class certification of Plaintiffs' proposed

class without motion, evidence, or argument implies the additional assumption that whatever class the Plaintiffs designate is an appropriate one. ETMF was denied an opportunity to challenge not only the propriety of a plaintiff class but also the *proper scope* of the plaintiff class in this litigation.

The Court of Appeals found the following class appropriate:

> All of East Texas Motor Freight's Mexican-American and black city drivers included in the collective bargaining agreement entered into between ETMF and the Southern Conference of Teamsters covering the State of Texas. (App. 83)

There are several factors which, had they been presented to a District Court properly exercising its discretion within the guidelines of Rule 23, would have required the narrowing of this class.

Each terminal within East Texas Motor Freight's system is an independent profit center. As such, the primary decision concerning hiring of employees is made at the terminal. (App. 103) Therefore, it is entirely possible that employment policies at one East Texas Motor Freight terminal might be discriminatory while those at another East Texas Motor Freight terminal are not. In this case, Plaintiffs were employed at the San Antonio terminal and there was no showing that their claims were typical of those of city drivers employed at other terminals. Therefore, the class would properly be limited to the San Antonio terminal. *See* Fed. R. Civ. P. 23(a)(3); *Sebastian* v. *J. C. Penney Co.,* — F. Supp. —, 12 F.E.P. Cases 1319 (E.D. Cal. 1975); *Jones* v. *United Gas Improvement Corp.,* — F. Supp. —, 12 F.E.P. Cases 344 (D.C. Pa. 1975).

Additionally, the factual determinations necessary to find that a city driver at a road domicile terminal had been discriminated against by virtue of East Texas Motor Freight's no-transfer rules differ significantly from those necessary to show discrimination against city drivers, such as the named Plaintiffs in this case, who are employed at terminals where road drivers are not employed. Thus, a District Court might properly exclude from the class city drivers at road domiciles because the interest of those drivers was asserted in the case filed against ETMF by the Justice Department in the Northern District of Texas on June 2, 1972, under Section 707 of Title VII. 42 U.S.C. 2000e-6. *Cf. Rodgers* v. *United States Steel Corp.*, 508 F.2d 152, 160 (3d Cir. 1975) (It is not an abuse of discretion for District Court Judge to postpone 23(c)(1) hearing until effects of consent decree potentially affecting members of alleged class can be determined).

More importantly, however, assuming *arguendo* that all of ETMF's city drivers had been discriminated against by the two "no-transfer" rules, city drivers at road terminals may well have a superior claim upon the available positions in the road driver category and, thus, the named Plaintiffs would be in competition with and therefore would not be in a position to adequately protect the interest of city drivers at road terminals. Although the Court of Appeals dismissed the contention that Plaintiffs may not fully represent the interests of those members of Local 657 who opposed the merger of seniority lines (App. 79-80), the Appellant Court, consistent with its entire approach to this case, ignored the real distinctions between the interests of city drivers at road terminals and those

of the named Plaintiffs. Where such a potential conflict exists, a District Court considering the mandate of Rule 23(a)(4) that the named Plaintiffs should fairly and adequately represent the class, must seriously consider severing city drivers at road terminals from the Plaintiff class. As the Court of Appeals said in *Philips* v. *Klassen*, 502 F.2d 362 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1975):

> Class members whose interests are antagonistic in fact to, or even "potentially conflicting" with, the interests of the ostensibly representative parties cannot be bound, consistent with the requirements of due process to an adjudication taken in their name. *Hansberry* v. *Lee*, [311 U.S. 32 (1940)]. Where courts discern that the interests of the named plaintiff are in significant part antagonistic to those of the class he purports to represent, they decline to entertain the action as a class action. *Id.* 366 (footnote omitted).

Finally, the theory of liability adopted by the Court of Appeals is premised on several critical assumptions relating to the aspirations and expectations of city drivers at the time they were initially hired. Were they frustrated road applicants who were shunted into the city driver classification, or were they simply applicants seeking whatever employment was available at the ETMF facility located near their residences? The resolution of this question will vary based on whether the city employee is employed at a road domicile terminal, the road driver hiring patterns at that terminal, and if no road drivers are employed at the terminal, its distance from the nearest road domicile terminal. The individual circumstances of the 21 ETMF terminal facilities in Texas are sufficiently distinct vis-a-vis claims of resident

city drivers that it would not have been an abuse of discretion for the trial court to have limited the Plaintiff class to the San Antonio terminal. However, the Court of Appeals deprived the Defendant of an opportunity to present that complex issue to the District Court, and in fact certified an inclusive Plaintiff class without considering or soliciting argument on the appropriate scope of the Plaintiff class.

The procedural history of this litigation exemplifies the dangers of shifting the class certification responsibilities from the District Court to the Court of Appeals. The District Court's determination dismissing the class action was supported by the evidence, was not clearly erroneous and should have been affirmed by the Court of Appeals. At the very least, the Court of Appeals should have vacated the case with instruction to the District Court to make the appropriate findings pursuant to Rule 23(c)(1) and, if it found that a class action was appropriate, to define the class and conduct a new trial. By determining the appropriateness of the class and liability to the class as it did, the Court of Appeals deprived the Defendants of due process of law.

For the foregoing reasons, it is ETMF's position that the trial court correctly dismissed the class action and the Court of Appeals was incorrect when it concluded that the District Court's finding that the Plaintiffs had abandoned the Plaintiff class was clearly erroneous. The Court of Appeals compounded its error when it *sua sponte* certified the litigation as a class action notwithstanding the Plaintiffs' and the District Court's failure to seek and make a Rule 23 determination as to the propriety of the Plaintiff class.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT THE MERE INTRODUCTION OF UNDIFFERENTIATED EMPLOYMENT DATA, CONSTITUTED A PRIMA FACIE CASE OF DISCRIMINATION AGAINST THE CLASS.

A. The Court's Decisions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Griggs v. Duke Power Co., 401 U.S. 424 (1971) Require that the Plaintiff in a Title VII Action Show More than a General Imbalance in the Defendant's Workforce.

The preceding portion of this brief sets forth an analysis of the deficiencies in the Court of Appeals decision to *sua sponte* certify this litigation as a class action. The root of the appellate court's error is that the parties did not try the matter as a class action. Thus, there is no factual record upon which to base a class action determination. The Court of Appeals' mistaken perception of the litigation as it actually occurred also flawed its ruling that ETMF was liable to the Plaintiff class. Contrary to its opinion, the Court of Appeals did not reverse a decision by the District Court because the latter court dismissed the class claims and, therefore did not make a finding on the merits. Rather, the Court of Appeals assumed the role of District Court and tried the matter in the first instance with respect to the Plaintiff class and entered a finding of liability against ETMF.

The Court of Appeals justified this novel appellate exercise by the conclusory statement it had "before [it] a record of the proceedings, completed as a class action, . . ." (App. 81). Based upon the incorrect assumption that the litigation was actually tried as a class action, the Court of Appeals held that the District Court's implied finding that ETMF did not discriminate against the Plaintiff class was clearly erroneous. (App. 97). In its opinion the Court of Appeals certified a Plaintiff class; reviewed a trial

record which, by stipulation, was limited to the individual claims of the named Plaintiffs; and reversed an "implied" finding by the District Court that ETMF was not liable to the Plaintiff class. The Court of Appeals thus reversed a trial court finding that had never been made with respect to a Plaintiff class that had not been before the District Court. For this reason, it is ETMF's position that the Court of Appeals' finding of liability with respect to the Plaintiff class was improvident.

Prescinding from the manner in which the Court of Appeals' finding of class liability was made, it is ETMF's position that the standards applied by the Court of Appeals to support its substantive finding of class liability were erroneous.

It is axiomatic that a Plaintiff in a Title VII suit, whether an individual action or a class action, has the burden of proof in a case involving employment discrimination. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975). Title VII protects persons from employment practices which affect them adversely "*because* of [their] race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (emphasis added). Title VII most emphatically does not protect members of minority groups from any and all adversity in their employment, but only from that adversity which would not have occurred but for their race, color, religion, sex or national origin. *McDonald* v. *Santa Fe Transportation Co.*, —— U.S. ——, 44 U.S.L.W. 5067, (U.S. June 25, 1976) at n.10. Thus, a Plaintiff to satisfy the burden of proof in a class action under Title VII must do more than show that the class members are protected under Title VII and have been affected adversely in their employment; the Plaintiff must also show that a particular adverse occurrence would not have taken place had the plaintiff class not been members of a protected group.

The Court has held that a certain quantum of evidence will raise a sufficiently strong inference of discrimination to create a *prima facie* case and to justify shifting the burden of proceeding to the defendant to show facts which establish a nondiscriminatory explanation for the Plaintiffs' allegations. *McDonnell Douglas Corp.* v. *Green, supra,* at 802. The quantum of evidence necessary to shift the burden will vary with the litigation, but the idea of a *prima facie* case has been adopted as a central part of our jurisprudence in civil rights litigation. If Defendant responds to the *prima facie* case with evidence sufficient to sustain a contrary inference, the burden again shifts to the plaintiff to show that Defendant's explanation is merely a pretext. *Id.* at 804. It is ETMF's position that the Court of Appeals' method of implementation of this general approach to the submission of proof was erroneous. The facts relied upon were facially inadequate to, consistent with due process, establish a *prima facie* case and thereby shift the burden of proceeding to ETMF.

The adverse employment situation from which the Plaintiffs seek relief is that they would like to be over-the-road drivers for East Texas Motor Freight and claim that they are prevented from becoming road drivers by ETMF's no-transfer rules and by the maintenance of separate lines of seniority.

The Court of Appeals conceded in its opinion, that ETMF's no transfer rules and seniority provisions were not inherently discriminatory, and said:

> "Typically, city drivers are not permitted to transfer to line driver jobs. Where they are, they

are not generally permitted to carry over seniority for job bidding and lay off purposes. The result is, at the very least, a strong disincentive for city drivers to transfer to the road. City drivers are thus effectively 'locked in' their city driving jobs with no realistic possibility of transferring to line driving positions. *Were there no more to the scenario, of course, the federal courts would likely have no concern; there is nothing per se illegal in no-transfer or separate seniority policies."* (App. 84) (emphasis added).

In order to prove a *prima facie* case of violation of Title VII, the plaintiffs must show initially that the neutral policy has a disproportionate impact on them because of their race or national origin. *Albermarle Paper Co.* v. *Moody, supra,* at 425.[10] Plaintiffs' theory of disproportionate impact is based on the factual

[10] In entering its finding of liability in favor of the Plaintiff class, the Court of Appeals focused on the employer's policies relating to transfer between classifications and ignored ETMF's facially neutral and uniformly applied rule restricting transfer between terminals. This policy, based on the employer's profit-center method of doing business would by its operation preclude the majority of the plaintiff class (city drivers employed at non-road domiciles) from consideration as road drivers and, if lawful, would function as a defense to liability. The Court of Appeals' necessarily implied finding that this policy was unlawful is unsupported by the record and by applicable precedent. In order to find that ETMF's facially neutral "no transfer between terminals" policy was discriminatory, the Plaintiffs would have had to prove that the policy perpetuated the consequences of past discrimination. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). In this instance, the Plaintiffs would have to prove that because of past discrimination, minority drivers were hired in city-driver-only terminals in disproportionate numbers. There is no evidence in the record to support such an assertion. Further, this question was not an issue in this litigation until it was implicitly decided by the Court of Appeals *sua sponte* as a premise to its finding of class liability.

premise that they were, at the time of hire, unlawfully refused employment as road drivers because of their race or national origin and that the personnel policies inhibiting post-employment transfer necessarily had a disproportionately adverse impact on them because they perpetuated the earlier unlawful hiring procedures. Therefore, as the Court of Appeals recognized, proof of past discrimination in hiring involving the Plaintiffs and their class is essential to the Plaintiffs' *prima facie* case. (App. 85). Without such proof, the Plaintiffs have established no nexus between their race or national origin and the employment situation that they are challenging in this litigation and no member of the class would be entitled to recover. *See, Franks* v. *Bowman Transportation Co., supra.* Therefore, the *prima facie* case determination turns on whether the Plaintiffs introduced sufficient evidence to show that the members of the plaintiff class were victims of discriminatory hiring policies.

The Court of Appeals held that "a *prima facie* case of discrimination may be established by statistical evidence and statitstical evidence alone." (App. 86). This aphorism is misleading in its simplicity because it is often mistakenly perceived as a universal rather than as a generalization.[11] The degrees of sophistication

[11] *See, e.g., Kaplan* v. *Theatrical and Stage Employees,* 525 F.2d 1354, 1358 (10th Cir. 1975); *U.S.* v. *TIME-D. C., Inc.,* 517 F.2d 299 (5th Cir. 1975), *cert. granted,* 44 U.S.L.W. 3669 (U.S. May 25, 1976); *Sabala* v. *Western Gillette,* 516 F.2d 1251, 1261 (5th Cir. 1975); *Pettway* v. *American Cast Iron Pipe Co.,* 494 F.2d 211, 225 n. 34 (5th Cir. 1974); *Reed* v. *Arlington Hotel Co.,* 476 F.2d 721, 723 (8th Cir.), *cert. denied,* 414 U.S. 854 (1973); *Parham* v. *Southwestern Bell Telephone Co.,* 433 F.2d 421, 426 (8th Cir. 1970).

with which statistics are submitted and the circumstantial context in which they appear in Title VII cases vary to such a degree on a case-by-case basis, that there is no uniformity in the point at which statistics establish a *prima facie* case and the burden shifts. When, however, the Court is careless in its analysis of the statistics and their context, the generalization runs rampant and legal theory supersedes reality.

In this case the following constitutes the totality of the Court of Appeals analysis of the Plaintiffs' evidence of past hiring discrimination:

> The statistics in the instant case are overpowering. East Texas Motor Freight has stipulated that prior to the date that Rodriguez filed a charge of discrimination with the EEOC in 1970, ETMF had never employed a Negro or Mexican-American as a line driver in that portion of the State of Texas covered by the Southern Conference Area Supplemental Agreement. (App. 86).

The Appellate Court's opinion points to no evidence in the record explaining why it considered this statistic to be "overpowering."[12] The opinion merely states that the statistics were so similar to those in other cases, where a *prima facie* case of past discrimination had been found, that these statistics, too, must con-

[12] Relying on its decision in this case, the Court of Appeals later rejected the attempts by defendants to point out the weaknesses in its statistical approach *United States* v. *TIME-D. C., Inc.*, 517 F.2d 299, 314-15 (5th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3669 (U.S. May 25, 1976). Borrowing the Court's own colorful phrase, the Court of Appeals for the Fifth Circuit has in this and later cases achieved the apotheosis of the "inexorable zero." *See Id.* at 315 and cases cited therein.

stitute a *prima facie* case. (App. 86). Even assuming the probity of the statistical evidence introduced in the cases relied upon by the Court of Appeals, the congruency of the factual background in those cases to the instant proceeding was not discussed and, in fact, does not exist. The fact that each of the cases relied upon by the Court of Appeals involved a trucking company's hiring practices at terminals which employed both city and road drivers significantly distinguishes them from this case and requires further analysis. In the present case the Plaintiffs purport to represent all ETMF's city drivers in the state of Texas, the majority of whom are not employed at road domicile terminals. To have become road drivers with East Texas Motor Freight at the time of initial employment, they would have had to apply at a geographically separate company terminal from the one at which they had actually applied and were ultimately employed. (App. 187). The carrier's local hire policy is uniformly applied to all similarly situated applicants whether minority or non-minority and is consistent with its profit center method of operation. (App. 187). The Court of Appeals found "terminal based responsibility for hiring, and of domiciling road drivers only at certain terminals is not discriminatory." (App. 103). With regard to city drivers employed at the San Antonio terminal, for example, the Plaintiffs must show that statistics introduced compel the conclusion that but for ETMF's past discriminatory hiring policies, they would, as a class, have applied and been employed as road drivers at an ETMF road domicile the nearest of which was approximately 240 miles away. The statistics regarding the racial

profile at road driver domiciles that were relied upon by the Court of Appeals are irrelevant to resolving this question.

Statistical evidence is simply an evidentiary tool, the value of which results from the difficulty of producing direct evidence of discrimination. As such, statistics should be used with care because they are by definition circumstantial [13] proof of discrimination. The inference to which they give rise must be measured to determine whether it includes within its logical

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[13] The assumption implicit in these cases is that absent discrimination, the racial profile of the defendant's workforce would mirror that of the surrounding geographical area or would contain a random distribution of women and minority employees at all levels. As one commentator has observed concerning such an assumption:

> Absent discrimination, of course, one would expect nothing of the sort. Economists labor market analysts, and sociologists have devoted endless energy to trying to determine the various elements that contribute to the distribution of jobs of minority groups. Some of the relevant factors are: Level of education, quality of education, type of education, location by region, by city, by part of metropolitan area, character of labor market at time of entry into the region or city, and many others. These are factors one can in part quantify. Others—such as taste or, if you will, culture—are much more difficult to quantify. Discrimination is equally difficult to quantify. To reduce all differences in labor force distribution (even for entry-level jobs) to *discrimination* is an incredible simplification. N. Glazer, *Affirmative Discrimination: Ethnic Inequality and Public Policy*, 63 (1975).

See also James v. *Wallace*, — F.2d —, 12 CCH EPD ¶ 11001 (5th Cir. 1976).

There is always the possibility that even a truly neutral selection process will result in a homogeneous workforce. This possibility increases as the number of available qualified minority persons in the geographical area in which the employer could reasonably be expected to recruit decreases.

limits the Plaintiffs' claims. *See, Robinson* v. *City of Dallas*, 514 F.2d 127 (5th Cir. 1975); *Coopersmith* v. *Roudebush*, 517 F.2d 818 (D.C. Cir. 1975); *Timken Corp.* v. *Vaughn*, — F. Supp. —, 12 F.E.P. 1140 (N.D. Ohio 1976).[14] Therefore, if a Plaintiff in a class action elects to rely on statistical evidence to establish a *prima facie* case of hiring discrimination against members of a class, he must show that members of that class were affected by the discrimination—that is, they were available, qualified, and present in a geographical area from which the Defendant could reasonably have been expected to recruit.

At the time they were hired by ETMF the Plaintiffs were residents of San Antonio and applied and were employed as city drivers in San Antonio. Pursuant to the carriers' policy of local hiring, applicants coming to the San Antonio terminal were considered only for vacancies at that facility. The only driving jobs available at the San Antonio terminal were in the city driver classification; the nearest company facility at which road drivers were employed was approximately 240 miles from San Antonio. There was neither evidentiary proof nor the factual basis for an intuitive inference that at the time they were hired, the plaintiffs or plaintiff class members had any interest in employ-

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[14] The logical illusions that may be drawn from statistics were illustrated by the District Court in *Lewis* v. *Pennsylvania Industrial Development*, 371 F. Supp. 877 (E.D. Pa. 1974):

> [I]t is statistically true that there have been no forest fires on Manhattan Island since the 'Smokey the Bear' advertisements have been displayed in New York subways. However, it is not commonly accepted that this statistic proves the value of advertising. *Id.* at 885 n. 14.

ment as road drivers at some distant location in the ETMF system. (App. 284).

Thus, the employment statistics introduced by the Plaintiffs do not raise an inference that ETMF discriminated against the Plaintiffs and the members of the plaintiff class who were hired in San Antonio or at other facilities located outside the labor market of a road domicile terminal. Even assuming *arguendo* that the statistics justified a preliminary inference that ETMF may have discriminated against Blacks and Mexican-Americans in hiring at its road driver domiciles,[15] there is no justification for the inference that ETMF discriminated against class members who were situated like the Plaintiffs in labor markets that have no connection with the local labor market areas from which road drivers were hired.[16]

In this case Plaintiffs presented no evidence to show why they should have been included in the labor market of a terminal 240 miles distant from the place at which they initially sought employment. The Court of Appeals appears to be of the opinion that Plaintiffs

[15] ETMF does not contend that there are no Black or Mexican-American persons qualified to be road drivers in the geographical areas surrounding each of its road terminals. However, a *prima facie* case of discrimination should include proof establishing that they existed in sufficient number to make defendant's failure to employ them highly improbable in the absence of discrimination. This is both a logical and fair requisite.

[16] A labor market is delimited by the geographic scope of the employer's search for job applicants and the area from which applicant/employees would reasonably respond to job possibilities. *See Timken Corp.* v. *Vaughn, supra* at 1144 (N.D. Ohio 1976); *Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87, 111 (E.D. Mich. 1973), *aff'd in applicable part*, 515 F.2d 301, 313 (6th Cir. 1975), *pet. for cert. filed*, 44 U.S.L.W. 3139 (U.S. Sept. 6, 1975).

and their class should be included in road driver labor markets irrespective of geography, stating simply: "We are not blind to the recognized mobility of today's minorities." (App. 103). The Court supports this novel thesis by citation to a decision which makes only a cursory reference to labor mobility in a dissimilar context. *See Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1361 (5th Cir. 1974).

ETMF believes that it was improper for the Court of Appeals to make a factual finding with respect to a controversial and critical premise in its legal analysis on the basis of judicial notice when neither the parties nor the trial court considered the question in the first instance. *City of Kenosha* v. *Bruno*, 412 U.S. 507, 514 (1973). However, even assuming judicial notice as theoretically acceptable in these circumstances, the 1970 census indicates that of Spanish surnamed or Spanish language persons living in the San Antonio area in 1970, more than half were living in the same house as in 1965 and another third were living in a different house in the same county. Bureau of the Census, *1970 Census: General, Social and Economic Characteristics, Texas*, table 97.

In contrast to the Court of Appeals' finding, reputable labor economists are of the opinion that data concerning the geographical mobility of minority families are too scanty to be conclusive. Parnes, *Research on Labor Mobility* at 117 (Social Science Research Council) (1954). However, minorities may be less likely to be geographically mobile because of the cost involved in moving. *See Id.* at 76-77; Reynolds, *The Structure of the Labor Market*, at 37-38, 41 (1951); Burton and Parker, "Interindustry Variations in Voluntary Labor Mobility," 22 *Industrial and Labor*

Relations Review, 199, 207 (1969); Galloway, "Labor Mobility, Resource Allocation and Structural Unemployment," 53 *The American Economic Review,* 694-97 (1963). Thus, at the very least, questions related to the socio-demographic phenomenon of minority labor force mobility or immobility are part of the burden of proof to make a *prima facie* case and are for the District Court to determine in an adversary proceeding.

In addition to the geographic scope of the labor market, the Plaintiffs should be required to establish the skill group from which the employer recruits. If there are a relatively small number of minority persons qualified to perform the job, or if all those qualified are employed elsewhere and not seeking employment, then the employer can hardly be held liable for failure to employ members of the minority group in issue. Failure to require the Plaintiffs to show that there are significant numbers of qualified members of the class in question in the available geographical labor market would be contrary to the Court's analysis of Title VII in *Griggs* v. *Duke Power Co., supra:*

> Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origin. Far from disparaging job qualifications as such, Congress has made such qualifications a controlling factor, so that race, religion, nationality and sex become irrelevant. What Congress has commanded is that any test used must measure the person for the job and not the person in the abstract. *Id.* at 436.

Because the Plaintiffs and their class have failed to show that as a class they were present in the geographic and available labor market from which East Texas Motor Freight could reasonably be expected to recruit,

they have failed to show that the Plaintiff class in this litigation have been victims of past hiring discrimination by ETMF. Having failed to show that essential element of their case, they have failed to establish a *prima facie* case of discrimination.

B. In Addition to a Showing of Past Discrimination in Hiring, the Plaintiffs Must, as Part of Their Prima Facie Case, Establish That at Least Some Members of the Class Have Been Adversely Affected in Their Employment because of the Challenged Policies.

Having found that the Plaintiffs had established a *prima facie* case of past discrimination in hiring, the Court of Appeals stated:

> The conclusion is inescapable that both the no-transfer policy and the maintenance of dual seniority rosters, one for city drivers and one for line drivers, have perpetuated ETMF's past discriminatory hiring practices. (App. 90).

The "inescapable" character of the Court of Appeals conclusion depends in part on the qualifications of the Plaintiff class to be road drivers at the time they were hired into the city driver classification and thereafter. There is no evidence in the record that the Plaintiff class as a group was or is so qualified.[17] Nor did the Court of Appeals point to any vacancy in the road category which could have been filled by ETMF city drivers had they not been "locked in" by the challenged practices. Thus, it is entirely possible if the

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[17] The District Court found that the named Plaintiffs themselves were not qualified to be road drivers. (App. A at 64 ¶¶ 23, 24). The Court of Appeals did not dispute this finding but merely required that ETMF consider them for road driver positions as openings occurred.

Court of Appeals decision is allowed to stand, that no member of the class will be entitled to relief. The employer would then be in the anomalous position of being liable to the class, but not liable to any individual class member. This anomaly results from the increasing use of bifurcated trials in Title VII class actions.

The burden of proof in Title VII class actions was first characterized as "a bifurcated burden of proof problem" by the Fifth Circuit in *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 443 (1974):

> Initially, it is incumbent on the *class* to establish that *an employer's employment practices have resulted in cognizable deprivations to it as a class.* At that juncture of the litigation, it is unnecessarily complicating and cumbersome to compel any particular discriminatee to prove class coverage by showing personal monetary loss. *What is necessary to establish liability is evidence that the class of black employees suffered from the policies and practices of the particular employer.* Assuming that the class does establish invidious treatment, the court should then properly proceed to resolve whether a particular employee is in fact a member of the covered class, has suffered financial loss, and thus is entitled to backpay or other appropriate relief. *Id.* at 443-44 (emphasis added).

The Fifth Circuit provided further insight into the bifurcated trial procedure in *Sagers* v. *Yellow Freight System, Inc.*, 529 F.2d 721 (1976):

> Title VII litigation is frequently conducted through a bifurcated proceeding. During the first stage, *general liability for discrimination against the class may be adjudicated*; if such liability is found, a second proceeding is held during which the specific relief due individual class members is determined and awarded. *Id.*, at 733 (emphasis added).

Until the Court of Appeals' decision in *Rodriguez,* the liability portion of the litigation required proof by the Plaintiff of discrimination "against the plaintiff class". The Court of Appeals has dispensed with the first stage requirement of discrimination against the Plaintiff class and has held that liability can be based on the mere finding that a Defendant employer discriminates. The Court of Appeals' approach results in a finding of "discrimination in the air" at the first stage of proceedings without any expectation that if the trial court and the parties go to the expense and effort of the second stage of the litigation that any class member will recover.

ETMF does not dispute the efficiency of the traditional bifurcated procedure in Title VII class actions which the Court impliedly approved in *Franks* v. *Bowman Transportation Co., supra,* 47 L. Ed. 2d at 466. In *Franks* the Court rejected the notion that at the liability stage of the proceedings, the Plaintiff must prove "vacancy, qualification and performance" for every individual member of the class. *Id.* at 466. It should be viewed as inconsistent to the purpose underlying Federal Rule 23 to require every class member to establish the fact and extent of their damage as a result of the challenged practice. However, the deferral of individual claims of discrimination does not justify eliminating from the litigation the requirement that the Plaintiff allege and present proof that the employer discriminated against him and his class. It is a fundamental principle of law that a Plaintiff must demonstrate injury to himself and to his class in order to state a cause of action. This principle is founded on Article III, Section 2 of the Constitution which restricts judicial power to "cases"

and "controversies". *Flast* v. *Cohen,* 292 U.S. 83, 94-101 (1968); *Weiner* v. *Bank of King of Prussia,* 358 F. Supp. 684 (E.D. Pa. 1973). The Court of Appeals, by permitting a finding of liability on the basis of an evidentiary record that does not include proof of injury to the Plaintiff and to the Plaintiff class, allows the Plaintiff to challenge employment practices in the abstract. The absence of a requirement that Plaintiff prove impact eliminates the assurance that there is a case or controversy and that the Plaintiffs and their class have the requisite adverseness to meet the "standing" corollary to the case of controversy principle. *Sierra Club* v. *Morton*, 405 U.S. 727, 738 (1972). The useful procedural tool of bifurcation cannot be permitted to transform the liability stage of Title VII litigation from a judicial trial to an administrative proceeding. The Plaintiff in a class action under Title VII must be required to establish as part of his *prima facie* case that the Plaintiff class has been injured by the Defendant's unlawful action.

The *Rodriguez* decision creates an imbalance between the policy that prompted the bifurcated procedure and the rights of the defendant to procedural fairness. In the second stage of a bifurcated proceeding, the burden shifts to the Defendant to prove that the individual claimant is not entitled to benefit from the remedial order. *Franks* v. *Bowman, supra,* at 466. If the element of injury enters only at this later stage, the Defendant, in order to avoid a monetary judgment, must prove a negative—that no qualified member of the class was interested in the job in question. Nothing in Title VII warrants such an unfair and drastic departure from our traditional allocation of the burden of proof in civil litigation.

The Court of Appeals for the Tenth Circuit recently recognized that a *prima facie* case necessarily includes proof that members of the class have actually been harmed by the challenged practice. *Rich* v. *Martin Marietta Corp.,* 522 F.2d 333 (10th Cir. 1975). In that case, the Court of Appeals said:

> [T]he plaintiff's evidence . . . adduced, including statistics *and general qualifications,* determine[s] whether the plaintiffs have proven a *prima facie* case. Only after that should the court hear the defendant's evidence as to nonqualification, nondiscrimination or business necessity. . . .
>
> Considered in this light, the court's findings that the plaintiff failed to make out a *prima facie* case become highly questionable. *The particular plaintiffs had long experience and were in a position in each and every instance to be considered for promotion,* so when they have shown their lengthy tenure and the extent and scope of their knowledge and experience, it would appear that they have established that they were qualified.
>
> . . . Once a plaintiff has shown that he is qualified, he need only show a discriminatory impact and that he was among the class of employees who could have been considered for promotion. Defendant may, of course, rebut this *prima facie* showing by producing evidence of objective business reasons or necessity for its failure to promote the plaintiffs. Plaintiffs, in turn, are free to show that this was pretextual. *Id.* at 347-48 (emphasis added.)

Similarly, in *Love* v. *Pullman Co.,* 12 F.E.P. Cases 332 (D.C. Colo. 1976), the District Court stated:

> . . . a bifurcated trial procedure . . ., the issue of liability to be tried first. If the outcome were to establish liability, or the *"fact of damage,"* then

> a subsequent proceeding, absent a settlement, would be required to determine the validity and amount of individual claims. *Id.* at 334 (emphasis added.)

The District Court defined the elements of a *prima facie* case in a class action to include:

> (1) members of the class were qualified for the desired positions; (2) there was a discriminatory impact on the class; and (3) they were among the class of employees who could have been considered for promotion [or hire] but for discriminatory policies. *Id.* at 339.

The courts in *Rich* and *Love, supra,* both implicitly required a showing that there are members of the class entitled to relief as an element of a *prima facie* case of liability under Title VII. *Cf. Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 (1970). As the Court of Appeals stated in *Harper* v. *Trans World Airlines,* 525 F.2d 409 (8th Cir. 1975):

> In order to successfully maintain a Title VII action, the plaintiff must initially prove that the practices of the employer have a discriminatory effect. While the employer is not necessarily vindicated merely because he lacks the intent to discriminate he will be *absolved* if *the plaintiff fails to prove a discriminatory effect upon a protected class.* If the discrimination is not shown, the judicial inquiry ends. *Id.* at 411 (citations omitted, emphasis added).

Without a showing of harm, there is no proof of discriminatory effect. In this case, the Court of Appeals entered a finding of liability in favor of the plaintiff class on the basis of a record devoid of discriminatory effect and pursuant to a legal analysis

that had no place for that critical factor in the calculus of liability. Unless the Court corrects this error and requires the plaintiffs to show that the Plaintiff class has been damaged by the challenged employment practice, the trial court would be imposing liability merely because a practice has the potential of being discriminatory. Congress did not intend the courts to function as administrative agencies in the enforcement of Title VII. Their proper role, under Section 706, is to decide claims of discriminatory activity. A Title VII trial must be directed toward that objective, and the class must be required to prove that they were the victims as part of their *prima facie* case of discrimination.

III. THE DISTRICT COURT'S FINDING THAT ETMF DID NOT DISCRIMINATE AGAINST THE NAMED PLAINTIFFS IS NOT CLEARLY ERRONEOUS BUT IS SUPPORTED BY THE STIPULATIONS OF THE PARTIES AND EVIDENCE IN THE RECORD AND, THEREFORE, SHOULD BE REINSTATED.

Whether or not the District Court correctly dismissed the class action aspects case, the liability of the Defendants to the named Plaintiffs was a separate issue to be decided independently of the question of liability to the class. The Courts of Appeals, including the Fifth Circuit, have held that in a Title VII class action, a court may find that a Defendant has discriminated against the class even though the named Plaintiff has failed to show that he was a victim of that discrimination. *E.g., Barnett* v. *W.T. Grant Co.,* 518 F.2d 543, 547-48 (4th Cir. 1975); *Baxter* v. *Savannah Sugar Refining Corp.,* 495 F.2d 437, 443-44 (5th Cir.), *cert. denied,* 419 U.S. 1033 (1974); *Roberts* v. *Union Co.,* 487 F.2d 387, 389 (6th Cir. 1973); *Martin* v. *Thompson Tractor Co.,* 486 F.2d 510, 512 (5th Cir. 1973).

Therefore, the findings of the District Court that the named Plaintiffs in this case were not qualified to be ETMF road drivers and that ETMF's failure to consider their qualification was not discriminatory must be reinstated unless they were "clearly erroneous." Fed. R. Civ. P. 52(a); *United States* v. *National Association of Real Estate Boards,* 339 U.S. 485, 494 (1950); *United States* v. *Yellow Cab Co.,* 338 U.S. 338, 342 (1949). The Court of Appeals pointed to no evidentiary basis for its conclusion that the District Court's findings concerning the individual claims of the named Plaintiffs were clearly erroneous. Indeed, it could not do so because those findings reflect a correct application of the law and are well supported by the evidence in the record.[18]

The Plaintiffs in this case stipulated that their individual claims of discrimination were based upon the

[18] The trial court made detailed findings of fact which included the following:

> 23. None of the plaintiff employees could satisfy all of the qualifications for a road driver position according to the company manual due to *age* or *weight* or *driving record.* The qualifications apply universally to all job applicants and employees and are not in any manner racially discriminatory.
>
> 24. The driving, work, and/or physical records of the plaintiffs are of such nature that only casual consideration need be given to determine that the plaintiffs cannot qualify to become road drivers. The failure of the defendant truck line to proceed with a detailed, comprehensive consideration of the plaintiffs' applications was for valid business reasons and not because of any discrimination against any of the plaintiffs because of their race or national origin.
>
> • • • • • • • • • •
>
> 28. The defendant truck line did not prevent or discourage the plaintiff employees from seeking or securing a road job transfer nor from making written application for said position because of their race or because they filed a complaint with the Equal Employment Opportunity Commission, or for any other reason. (App. 64-65).

legal theory that after their original lawful employment, they had been "locked in" to the lower paying job of city driver. They further stipulated that the only issue before the court was whether or not failure to consider Plaintiff's road driver application constituted a violation of Title VII. (App. 113, 115 ¶ 8.) In order to prevail under this theory, the Plaintiffs must show that they were discriminated against by ETMF in their initial hire. Otherwise, the no-transfer rules, although they admittedly have the effect of locking the Plaintiffs into their city driver jobs, do not perpetuate the consequences of past discrimination. Absent past discrimination in hiring, these rules are neutral in effect as well as being facially neutral and, therefore, do not violate Title VII. *See Griggs* v. *Duke Power Co., supra.*

Here, the Plaintiffs stipulated that they had not been discriminated against in their initial hire at the San Antonio terminal. (App. 113, ¶ 1). This stipulation, like the stipulation of the issues, *supra,* is absolutely binding. Even in criminal cases courts have recognized the binding effect of stipulations whether they operate against the prosecution or the Defendant. *H. Hackfeld & Co.* v. *United States,* 197 U.S. 442, 447 (1905);[19] *United States* v. *Harding,* 507 F.2d 294, 298 (10th Cir. 1974); *Osborne* v. *United States,* 351 F.2d 111, 120 (8th Cir. 1965) (supplemental opinion on rehearing). Such stipulations are encouraged by Rule 16 of the Federal Rules of Civil Procedure and are

[19] In *Hackfeld,* the parties stipulated to the ultimate fact in controversy—that the escape of immigrants could not have been reasonably anticipated by and did not occur by reason of any negligence on the part of the defendant. The Court construed the criminal statute in question to require a finding of negligence and, therefore, the petitioner's conviction was reversed.

uniformly held to be binding unless the party seeking to be relieved from them can show they were obtained by fraud, duress, or misrepresentation. *Farmers Co-Operative Elevator Association* v. *Strand,* 382 F.2d 224, 231 (8th Cir. 1967), *cert. denied,* 389 U.S. 1014, *reh. den.,* 390 U.S. 913 (1968); *Osborne* v. *United States, supra,* at 120.

As the Fifth Circuit itself recognized in *Laird* v. *Air Carrier Engine Service,* 263 F.2d 948 (5th Cir. 1959):

> Those statements or agreements which dispense with proof of fact are made with respect to the impending trial and, until withdrawn, are not merely evidence as in the case of an ordinary admission. They are absolutely binding. As long as they stand, they foreclose the matter all together . . . Any other rule would largely destroy the utility of pretrial. *Id.* at 953-54.

Accord, Risher v. *United States,* 465 F.2d 1, 5 (5th Cir. 1972).

Because they were not discriminated against by ETMF's hiring practices at the San Antonio terminal, the named Plaintiffs would have to show that they were forced into applying for employment as city drivers at the San Antonio terminal because of discriminatory hiring policies at geographically distant ETMF road driver terminals.

No evidence was introduced by any of the named Plaintiffs establishing that they had made inquiries at a terminal in which ETMF domiciled road drivers, that they had made application there, or that they were aware that ETMF allegedly discriminated in

hiring at road driver domicile terminals and, thus, were deterred from applying there. Absent such proof, the Plaintiffs have failed to show that they were prejudiced in their employment because of their race or national origin. Therefore, the District Court correctly concluded that:

> Refusal by the Defendant truck line to permit job transfers without loss of terminal seniority or to maintain separate seniority lists is a reasonable and proper business practice and in accordance with the Union contract and in no manner causes, perpetuates or results in discriminatory practices by any of the Defendants. (App. 64-65, ¶¶ 26-27).

The fact that Plaintiffs are employed at a city-only terminal distinguishes this case from a series of cases relied upon by the Courts of Appeals which have found that the trucking industry's no-transfer rules and separate seniority lines for city and road drivers discriminated against minorities because they have had the effect of locking minorities out of road driver jobs, which they had initially preferred, and still prefer, and which they would have had but for the original discrimination in hiring.[20] In each of those cases, the

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[20] The Court of Appeals relied on the following cases:

Thornton v. *East Texas Motor Freight,* 497 F.2d 416 (6th Cir. 1974); *Witherspoon* v. *Mercury Freight Lines, Inc.,* 457 F.2d 496 (5th Cir. 1972); *Hairston* v. *McLean Trucking Co.,* 62 F.R.D. 642 (M.D.N.C. 1974) (later *aff'd* 520 F.2d 226 (4th Cir. 1975); *United States* v. *Navajo Freight Lines, Inc.,* — F. Supp. — (C.D. Cal. 1973) (later *aff'd* in part and *rem'd* in part 525 F.2d 1318 (9 Cir. 1975); *Sabala* v. *Western Gillette Inc.,* 362 F. Supp. 1142 (S.D. Tex. 1973) (later *aff'd* in part and *rev'd & remanded* in part 516 F.2d 1251 (5th Cir. 1975); *United States* v. *Lee Way Motor Freight* 7 CCH

courts found that the Plaintiffs would have preferred to be road drivers when they initially applied for employment at a terminal at which the Defendant employer domiciled road drivers. Because of Defendant's discriminatory hiring policies, they were forced to accept employment as city drivers. In most of those cases, the employer, by the time of trial, had ceased to discriminate against Blacks and Mexican-Americans in hiring into the road category, but those members of the class who were the original victims of discrimination and who still wished to be over-the-road drivers were not benefited by the new nondiscriminatory policy. They were deterred from applying for over-the-road employment with their employers because in some cases, they would have to resign their jobs as city drivers with no assurance that they would be rehired as road drivers. In all cases, they would have had to forfeit their company seniority and go to the bottom of the road seniority list. Even though the same policies were enforced against White-Anglo city drivers wishing to become road drivers, courts have found that these facially neutral policies violate Title VII because they prevent the original victims of discrimination from obtaining those positions they would have had from their date of hire but for their race and, thus, they perpetuate the effects of past discrimination.

E.P.D. ¶ 9066 (W.D. Okl. 1973); *Sagers* v. *Yellow Freight System*, 388 F. Supp. 507 (D.C. Ga. 1973) (later *aff'd* as modified 529 F.2d 721 (5th Cir. 1976)).

All of these cases involved plaintiffs who made application at terminals at which road drivers were domiciled, but because of defendants discriminatory hiring policies were forced into the city driver classification at that terminal. Research discloses no other cases in which a court has found that city drivers at non-road domiciles were entitled to recovery on the "lock-in" theory.

Jones v. *Lee Way Motor Freight*, 431 F.2d 245, 248 (10th Cir. 1970).

Here, the Plaintiffs have failed to prove that they were discriminated against in their original hire; therefore, they have failed to prove an essential element of their case. They are concededly locked into the city driver category by ETMF's policy which prohibits transfer between terminals, but that policy does not perpetuate the consequences of past discrimination. Having failed to prove that but for their race they would have initially been hired as road drivers, they simply failed to prove that they are entitled to recovery under Title VII. *See Franks* v. *Bowman Transportation Co.*, — U.S. —, 47 L. Ed. 2d 444, 466 (1976).

In addition to the foregoing fatal failure of proof, the District Court found that none of the named Plaintiffs met ETMF's qualifications. Proof that the individual Plaintiffs are qualified is likewise essential to their case. In *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the Court articulated the burden of proof which an individual Plaintiff must meet in order to prove a *prima facie* case under Title VII of the Civil Rights Act as follows:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) *that he applied and was qualified* for a job which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802 (emphasis added).

In a footnote, the Court stated:

> [13] The facts necessarily will vary in Title VII cases, and the specification above of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations. *Id.*

Relying upon the Court's caveat in footnote 13, the Court of Appeals held that the individual Plaintiffs did not have to meet the requirements of *McDonnell Douglas Corp.* v. *Green, supra,* because:

> First, this is a class action. Equally important, the Supreme Court noted in *McDonnell Douglas* no history of past employment discrimination or any other factor that might have discouraged the Respondent from applying for a job. . . . We note also another distinction. In *McDonnell Douglas,* the Respondent's qualifications were undisputed. He had held the job, and apparently satisfactorily, before he was laid off. In the instant case, in contrast, the possibility of meeting one of the most important criteria for hiring—the road test—has been denied to the class of city drivers. (App. 89).

See also Herrera v. *Yellow Freight System,* 505 F.2d 66 (5th Cir. 1975).

The fact that this case was characterized as a class action has no impact upon the application of the *McDonnell Douglas* standard to the individual claims. Nor are the other distinctions sufficient to justify disregarding the plain meaning of the Court's decision in *McDonnell Douglas* that an individual Plaintiff in a Title VII suit must, at a minimum, prove that he is qualified to perform the job that he claims has been unlawfully denied him. The proof of qualification is

a *sine qua non* of a *prima facie* case of employment discrimination. *Griggs* v. *Duke Power Co., supra,* at 436.

Brushing aside the stipulation of the parties to the contrary,[22] the Court of Appeals held that the requirement of three years immediately preceding road driving experience had a disparate impact on Blacks and Mexican-Americans and was therefore discriminatory.

There is no indication from the District Court's opinion that, absent the three-year experience requirement, it would have found the named Plaintiffs qualified. On the contrary, the District Court found that:

> None of the Plaintiffs could satisfy all of the qualifications for a road driver position due to *age, weight or driving record.* The qualifications apply universally to all job applicants and employees and are not *in any manner* racially discriminatory. (App. 64 ¶ 23).

These conclusions were based on detailed findings of fact (App. 60, 61 and 63) which have ample support in the record. (Defendant Exhibits C, F, G, H, K, L, NN, BB, CC, GG, JJ, LL, VV, AA, BB, CC, DD, and HH).

Assuming *arguendo* that Plaintiffs instead of stipulating that the road driver qualifications, including the

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[21] The Plaintiffs had stipulated that ETMF's road driver qualifications were not discriminatory. (App. 113 ¶ 5). The Court of Appeals rejected this stipulation on the stated assumption that an experienced attorney would not have "stipulated away their right to relief on the eve of trial." (App. 97). Whatever counsel's motive for entering into these stipulations, he did so voluntarily with no fraud or misrepresentation on Defendant's part and, therefore, he must be bound by them. *H. Hackfeld & Co.* v. *United States, supra.*

three-year over-the-road experience requirement, were nondiscriminatory, had proven that some requirements had a disparate impact upon Blacks or Mexican-Americans, there was substantial evidence in the record from which the District Court could have determined that they were nevertheless not violative of Title VII.

In *Griggs* v. *Duke Power Co., supra,* the Court stated that:

> The touchstone is business necessity. If an employment practice which operated to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited. *Id.* at 431.

Because the test and high school completion requirement at issue in *Griggs* had not been shown to "bear a demonstrable relationship to job performance," it was necessary for the Court to further define the concept of "business need" in this context. Despite the Court of Appeals' disfavor of the experience requirement, there can be no question that a requirement of actual experience in a job bears a demonstrable relationship to performance of that job. Furthermore, the record in this case clearly shows that ETMF's road driver qualifications were instituted in the face of urgent business necessity. (App. 176-180).

Early in the 1950's, ETMF had a serious problem with accidents in its over-the-road operation. Because of ETMF's poor safety record, the ICC Department of Transportation suspended ETMF's authority to haul certain classes of government freight and had also withheld additional route authority sought by ETMF. (App. 164, 179). As a result, ETMF instituted more

stringent qualifications for road drivers than city drivers. (App. 176-178). In order to maintain its high standards for road drivers, the "no-transfer" rule between classifications was imposed. (App. 167). The record plainly shows that after the implementation of these qualifications, ETMF's safety record improved dramatically, far surpassing in each year the available official statistical records showing the average record of trucking industry as a whole. (App. 416).

In light of this showing of job relatedness and business necessity, the burden again shifts "to the complaining party to show that other tests or selection devices without a similar undesirable racial effect would also solve the employer's legitimate interest in 'efficient and trustworthy workmanship.' " *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 425 (1975) (citing *McDonnell Douglas* v. *Green, supra* at 802). The Court of Appeals assumed that a three-year city or road driving experience requirement would equally serve ETMF's needs. (App. 102-103) That assumption is not supported by facts in the record. Indeed, the record clearly establishes that the mental and physical demands placed on a road driver differ significantly from those placed upon a city driver. (App. 302-305). Considering the serious threat an unqualified road driver poses, not only to ETMF's business but to the general public as well, the plaintiff in this case must show that other requirements would prove equally as effective. No such showing has been made. ETMF's qualifications, therefore, do not violate Title VII, and plaintiffs' failure to meet these qualifications precludes them from prevailing against ETMF in this litigation.

Like the National Labor Relations Act, nothing in Title VII abrogates an employer's right to select its

own employees. *McDonald* v. *Santa Fe Trail Transportation Co.*, 44 U.S.L.W. 5067, 5070 (U.S. June 25, 1976); *see NLRB* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). The Plaintiffs have not shown that they were disqualified because of their race or national origin. Therefore, ETMF's neutral qualifications which bear a demonstrable relationship to an urgent business need must be allowed to stand, especially when, as here, no effective alternative has been advanced by Plaintiffs.

The opinion of the Court of Appeals analyzed neither the facts as found by the District Court nor the manner in which the District Court applied the law to those facts. As we have shown, proper consideration of these factors compels a finding that the District Court was correct in concluding that ETMF had not discriminated against the named Plaintiffs. Because there was no error in the District Court's application of the law to facts well supported in the record, the decision of the District Court should be reinstated.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed with the instructions to reinstate the order of the District Court, dismissing the action.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*,

v.

JESSE RODRIGUEZ, MODESTO HERRERA, and SADRACH PEREZ, *Respondents*.

REPLY BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC., *Petitioner*,

v.

JESSE RODRIGUEZ, MODESTO HERRERA, and
SADRACH PEREZ, *Respondents*.

REPLY BRIEF OF PETITIONER EAST TEXAS MOTOR FREIGHT SYSTEM, INC., TO THE SUPREME COURT OF THE UNITED STATES

Despite its bulk and righteous tone, the Respondents' brief does not address the issues raised by ETMF's Petition for *Certiorari* or the arguments made in the ETMF's brief. Rather, the Respondents have misrepresented ETMF's arguments and have attempted to reply to the arguments it wishes ETMF had made. Furthermore, the Respondents have asked the Court to find facts based on testimony in the record which had

apparently been discredited by the trial judge and to take judicial notice of evidence submitted in a subsequent trial in different litigation and at which ETMF was not an active participant.

This case raises serious legal questions concerning the proper application of Rule 23 of the Federal Rules of Civil Procedure and the allocation of the burden of proof in Title VII class actions. These questions would not have been raised but for the Court of Appeals' desertion of its appellate function. The Court of Appeals decided factual, procedural, and legal questions which, by virtue of the Plaintiffs' trial strategy, had not been submitted to the trial court for initial decision. Further, the appellate court overturned findings of the trial court even though those findings were supported by the record and were not clearly erroneous and even though the trial court's conclusion reflected a correct application of the law. In light of the named Plaintiffs' apparent abandonment of the class, the trial judge correctly refused to bind non-present persons to the judgment. The trial court's conclusion that ETMF had not discriminated against the named Plaintiffs was correct in that Plaintiffs' theory of liability required an initial finding of discrimination in hiring which the Plaintiffs failed to prove. Indeed, Plaintiffs stipulated to the contrary. (App. 417(1)) Alternatively, the District Court properly concluded that the Plaintiffs were not qualified to be over-the-road drivers and, therefore, were not harmed by the alleged lock-in effect of ETMF's policies and thus were not entitled to recover under Title VII of the Civil Rights Act, or 42 U.S.C. § 1981. The Respondents have not addressed the serious questions raised by this case but seek to distract the Court by its emotional plea for affirmance.

ARGUMENT

I. THE RESPONDENTS' BRIEF ILLUSTRATES THE CONFUSION WHICH RESULTS FROM AN APPELLATE CLASS CERTIFICATION BASED UPON AN INCOMPLETE RECORD.

Rather than respond to ETMF's legal arguments that Rule 23(c)(1) requires that Plaintiffs take the initiative to secure the early certification of the class by the trial court, Respondents argue simply that ETMF and the Union Defendants were not prejudiced by these errors. Respondents assert that in this case, as in *Senter* v. *General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), and in *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441 (5th Cir. 1973), all parties understood that the cases were being litigated as a class action. (Resp. Br. at 35).[1] For the reasons stated in our brief in chief, ETMF believes that the mandate of Rule 23(c)(1) is ordinarily absolute. (ETMF Br. at 13-29). The Plaintiffs must submit the class question, and a certification decision must be made early in the litigation so that the record is clear with respect to the scope of the dispute between the parties. Assuming *arguendo* that there are certain cases in which the failure of the District Court to abide by the mandate of Rule 23(c)(1) is harmless error, *see Jimenez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975), in the instant litigation, the confusion and prejudice to the Defendants is manifest in Respondents' own brief.

The pre-trial order, upon which Plaintiffs rely in support of their argument that everyone understood that the case was being tried as a class action, was drafted well in advance of trial and was served upon

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[1] References to the Respondents' brief will appear: Resp. Br. References to East Texas Motor Freight's brief will appear: ETMF Br.

the opposing parties on January 12, 1973. Respondents neglect to point out that all of the Defendants' proposed pre-trial orders, expressly denying the appropriateness of the class action, were filed and made a part of the record at the same time. (Docket Entries at 48, 49, 50, 51; App. at 4, 117). More importantly, on the very morning of trial, the Plaintiffs stipulated that the only issue presently before the court was "whether the failure of the Defendant, East Texas Motor Freight, to consider Plaintiffs' line-driver applications constituted a violation of Title VII and 42 U.S.C. § 1981." (App. at 113-118). Surely, the Defendants were justified in believing that this Agreement superseded the proposed pre-trial order which had been drafted several weeks before. Thus, this case is distinguishab'e from *Senter* and *Bing, supra,* and is more similar to *Nance* v. *Union Carbide Corp.,* — F.2d —, 12 CCH EPD ¶ 11,106 (4th Cir. 1976), in which the Court refused to certify a case as a class action in the face of stipulations in the record by the Plaintiff that she did not intend to bring a class action. *Id.* at pp. 5112-5113.

The appellate certification of the class prejudiced the Defendants in two ways. Defendants were deprived of the opportunity to present evidence and legal arguments concerning the appropriateness and scope of the class. Secondly, Defendants were deprived of the opportunity to present evidence tending to refute the allegations of class discrimination.

The arguments contained in Respondents' brief concerning the appropriateness of the broad class should have been made in the first instance to the trial judge. (*See* Resp. Br. at 43). Indeed, Respondents admit that some of the arguments which ETMF would have made to the District Court judge might justify narrowing

the scope of the class or the establishment of subclasses. (Resp. Br. at 45).

Despite the Respondents' misconstruction of ETMF's argument, ETMF is not asking this Court to make the determination as to the appropriateness of the class. As this case makes abundantly clear, the determination of the nature and scope of the class is uniquely suited to determination by the trial judge and is simply inappropriate for consideration at the appellate level. Indeed, the experience of the federal courts with class actions, both under Title VII of the Civil Rights Act and under other remedial legislation, indicates that the District Courts should exercise greater discretion in the formation of the class and conduct of the class lawsuit. *See* argument, pp. — *infra. See generally, Developments—Class Actions,* 89 Harv. L. Rev. 1319 (1976).

ETMF believes that in light of Plaintiffs' trial strategy, the District judge properly regarded the class as having been abandoned and, thus, dismissed the class allegations. *See Johnson* v. *Shreveport Garment Co.,* — F. Supp. — 13 BNA FEP 1677 (W.D. La. Nov. 18, 1976 (class decertified in decision on merits because plaintiffs' counsel had not adequately represented class). If this was indeed legal error, the proper appellate remedy would have been to remand the case to the District Court with guidance concerning the issues to be resolved and the standards to be applied in making the class determination. With such guidance, the District Court could have proceeded to trial on the merits if the class had been certified. *See Burns* v. *Elrod,* 509 F.2d 1133, 1136-37 (7th Cir. 1975).

Jimenez v. *Weinberger, supra,* cited by the Respondents for the proposition that post-trial certification

should be allowed, is clearly distinguishable. The primary issue in *Jimenez* was whether a portion of the Social Security Act was constitutional. *See* 417 U.S. 628 (1974). The *Jimenez* case was remanded in order to allow the Plaintiffs to establish their eligibility under the Act. 417 U.S. at 137-38. On remand, the District Court found that the Plaintiffs were eligible and certified the case as a class action. The Court of Appeals affirmed on the basis that the certification would have been proper had it come prior to the decision on the merits; that mere delay in certification did not deprive the *District Court* of its *power* to enter the order and that the intervening appeal and remand did not deprive the Court of that power. 523 F.2d at 699. The Court of Appeals then determined that the District Court's breach of Rule 23(c)(1) did not constitute reversible error. The key to the Court of Appeals' decision on the latter point was that the belated certification of the class did not prejudice the Defendant government because the government could not relitigate the issue of the constitutionality of the statute in a subsequent class action. *Id.* at 701.

Similarly, in *Sprogis* v. *United Airlines*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), the Court of Appeals held that the District Court had the power to certify the class after trial "where justice requires." *Id.* at 1201. On remand, however, the District Court refused to exercise that power because, among other reasons: "The issues in *Sprogis* have been decided without considering the claims of other members of a purported class." 56 F.R.D. 420, 423. In this case, too, the issues at trial were related to the individual Plaintiffs, and post-trial certification has severely prejudiced the Defendants.

Had the instant case been certified before trial on the merits by the District Court judge, in a manner identical to the class certified by the Fifth Circuit on appeal, the Defendants would have submitted statistical and demographic evidence which would tend to show that there was no discrimination in the initial hire of the Plaintiff class. Also, ETMF would have introduced evidence concerning the hiring practices at each of the terminals in Texas. The Respondents' attempts to represent this case as one which has been tried as a class action are limited to pointing to bits of evidence in the record which might also have been introduced in a class action. The mere existence of facts which are material to certain class claims as well as relevant to certain individual claims does not make the case one tried as a class action. There are many items of proof which are material to the question of whether ETMF was liable to members of a class of city drivers as well as material to whether ETMF had discriminated against the individual Plaintiffs. The right of a Defendant to know the nature and extent of the claims against it is fundamental to due process. *Saunders* v. *Shaw*, 244 U.S. 317 (1917). Those factors weigh heavily in the choice and extent of testimony, exhibits, research, and the development of litigation strategy which allow counsel to effectively present his or her case without wasting judicial time with the introduction of unnecessary evidence. The Defendants were deprived of that knowledge in this case. This Court should reinstate the judgment of the District Court or, in the alternative, order a new trial should it find that the District Court's dismissal was improper.

The experience of the courts with class actions under Title VII indicates that the District Court judge

should apply the requirements of Rule 23(a) and (b) with great care in Title VII cases. The approach adopted by the Fifth Circuit actually frustrates the purpose of class actions: to settle in one lawsuit the greatest number of claims with due regard for the rights of all affected persons whether or not they are members of the class. *See generally, Developments-Class Actions, supra.*

For example, one of the early class actions under Title VII was *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968). In *Quarles,* the class was described as "all blacks employed therein." The *Quarles* court determined that the Stemmery employees were not discriminated against by the Company's employment policies. *Id.* at 519. Later, certain black Stemmery employees brought suit alleging violations of Title VII presumably disposed of in the *Quarles* suit. *Lewis* v. *Philip Morris, Inc.*, — F. Supp. —, 13 BNA FEP 104 (E.D. Va. July 7, 1976). Judge Merhige refused to bind the Plaintiffs in *Lewis* to the *Quarles* finding, saying:

> Although the class in *Quarles* did include Stemmery employees, indeed the named plaintiffs in that case were former Stemmery employees who had transferred to the Prefabrication Department, the claims of the Stemmery employees were seemingly lost in the breadth and ambition of the class's overall interest. *Quarles,* which was one of the early resolutions of a Title VII controversy, reflects in its opinion and documents contained in the case file that the plaintiffs therein were, in part, seeking to secure equal benefits for what readily appeared to be a deserving class—the black *permanent* employees of the Company.
>
> * * *

> The *Quarles* opinion, authored by now United States Circuit Judge John D. Butzner, was and is one of the monumental decisions in the area of Title VII law for its astute realization that practices that are currently neutral may, in effect, perpetuate past discriminatory practices. It suffers, however, from the plaintiffs' attempt to include a broad class of litigants and yet prepare and advocate with force the claims of some class members to the detriment of a distinct and aggrieved alternative portion of the class. 13 FEP at 108.

Similarly, the Court of Appeals for the Ninth Circuit recently found it necessary to overturn the settlement of a Title VII class action, partially because of potential conflicts among the members of the broad class of: "[A]ll past, present, future and potential applicants of Basic who are Negroes, Asians, American Indians, Spanish-surname Americans or females." *Mandujano, et al.* v. *Basic Vegetable Products,* 541 F.2d 832 (9th Cir. 1976).

The foregoing cases illustrate the problems which will continue to result if the Court endorses the cavalier, broad brush approach to class actions brought under Title VII which the Fifth Circuit has adopted. Rather, the function of certification of the class should remain with the trial judge. Plaintiffs who initiate class actions should be required to present the class question to the trial court to facilitate an early determination by the trial court pursuant to the standards of Rule 23. This procedure is consistent with due process and efficient judicial administration. Problems resulting from an ambiguous trial record would be avoided. In making the class action determination, the District Court should be mandated to carefully apply the re-

quirements of Rule 23(a) and (b) in order to best protect the interests of the Defendants, the named Plaintiffs, and the members of the alleged class.

II. RESPONDENTS HAVE NOT ADDRESSED THE QUESTION RAISED IN THIS CASE OF THE PROPER BURDEN OF PROOF IN A TITLE VII CASE.

Respondents devote a substantial portion of their brief to refuting a perceived argument that the standards of proof in a Title VII class action should be the same as those announced in the Supreme Court's decision in *McDonnell Douglas Corp* v. *Green,* 411 U.S. 792 (1973). A fair reading of ETMF's brief reflects that ETMF does not rely exclusively on *McDonnell Douglas* but argues that in a Title VII class action, a *prima facie* showing of a violation in Title VII must include:

1. That the neutral policy in question has a disproportionate impact on members of a minority group which is causally relaxed to their race, religion, color, sex or national origin. Statistical evidence, properly considered, will show the disparate impact and may give rise to an inference of causation if no other factors satisfactorily explain the disparity. (ETMF's Br. at 40-48).
2. That the plaintiff class viewed as an entity has been adversely affected in their employment because of the challenged policies. That is, that there exist persons in the class who are qualified to perform the job and who were available for employment at the time the employer had vacancies in the desired category. (ETMF's Br. at 49-55).

The Court of Appeals in its decision and the Respondents in their brief have utilized numbers or "statistics" in a manner that ignores their validity as the basis for an evidentiary inference. The Court of Appeals inferred from the statistics introduced by the Plaintiff-Respondents that ETMF had discriminated against members of the plaintiff class in hiring road drivers. However, the data relied upon by the Court of Appeals and the Respondents do not support this inference for two reasons: Plaintiffs have not shown that the employment figures which they have introduced would be unlikely to result from a series of hiring decisions untainted by considerations of race or national origin. Therefore, they have not established a causal relationship or nexus between the statistic and the fact they are attempting to establish. Secondly, plaintiffs have not shown that the members of the class of ETMF city drivers in the State of Texas were the victims of the alleged discrimination in hiring. Thus, they have not established a nexus between the statistical inference and the plaintiff class on whose behalf the evidence is being offered. The aggregate effect of the Respondents' approach is that the "statistics" do not measurably assist the trial court in resolving the disputed fact or in determining whether the inference is relevant to the claims of the plaintiff class.

Respondents' simplistic comparison of ETMF's employment figures to the ratio of blacks and Spanish-speaking persons in the metropolitan area surrounding each facility does not tend to establish, without more, that ETMF discriminated at a particular facility or group of facilities on the basis of race or national origin. The Respondents did not offer and the Court of Appeals did not require proof that the labor market for the facility was essentially conterminous with the population pool reflected by plaintiffs' statistics. Similarly,

the record lacks evidence that the racial and ethnic profile of the population pool accurately reflects the racial and ethnic profile of the qualified and available labor market within which the employer could reasonably be expected to recruit. Both of these considerations are nuclear elements of any inference to be drawn from the bare statistics. The Plaintiffs-Respondents must have the burden of initially establishing each element underlying the inference before the defendant may be called upon to contest its presumptive validity. Respondents are seeking to shift the burden to the defendant to rebut an inference before it is established. As a result the failure to rebut *creates* the inference and the burden of proof has been totally and improperly shifted to the defendants and it is thereby invested with the unfair task of establishing a negative proposition, *i.e.*, there is no statistical basis for an inference of class liability.

The statistical arguments raised on pages 66-67 of respondents' brief were never presented to the trial court and thus never considered in the class context. However, they exemplify the fallacy inherent in respondents' novel approach to proof in an adversary proceeding. They compare ETMF's employment data and the 1970 census population data for the surrounding metropolitan statistical areas. The plaintiffs point to Longview, Texas, a city which they claim has 20% minority population. This figure appears to be based upon the 1970 census figures. The 1972 compliance data included in the Appendix at pages 395-398 for that city indicate that there were 28 city drivers at the Longview terminal, all of whom were hired before 1970. There is no evidence concerning the minority population of Longview in the 1940's, '50's, or '60's, when all

of these persons were hired. Furthermore, the plaintiffs ask the Court to compare ETMF's hiring data with the gross population statistics for the surrounding metropolitan area. There is no reason that such a comparison is appropriate. The standard metropolitan statistical area is simply a statistical construct used by the Bureau of Census. There is no basis to conclude that the standard metropolitan statistical area is necessarily congruent with the geographical area which would normally be the labor market for the ETMF city terminal in Longview. Nor is there any indication that the minority population of Longview presents the same ratio of minorities to whites as the available work force. *See Johnson* v. *Shreveport Garment Co.*, *supra* at 1686-88.

Equally important and endemic to both the decision of the Court of Appeals and the respondents' brief is the failure to condition the legitimacy and relevance of the statistical inference on an evidentiary showing that the plaintiff class in this litigation was adversely affected by the factual finding that is the subject of the inference. The plaintiff class is composed of a finite number of individuals who were initially employed at various facilities of the respondent employer. The essence of the respondents' legal theory is that at the time they were hired they were precluded from employment as road drivers. Otherwise, the subsequent application of neutral employment and seniority practices were non-discriminatory. Notwithstanding the centrality of hiring discrimination to their claim, no evidence was introduced, and no evidence was required, to establish that the plaintiff class was the object of discrimination in hiring. Ironically, the individual plaintiffs, by stipulation, conceded they were employed in a non-

discriminatory manner. The Court of Appeals created a *prima facie* case without record evidence sufficient to establish that the plaintiff class was adversely affected by the statistical inference of discrimination. The respondents' brief is silent on this point and impliedly would have the Court adopt a standard of proof that would find liability to the class without evidence of injury to the class. Assuming *arguendo* that an employer is guilty of hiring discrimination on the basis of race at a specific facility, under respondents' and the Court of Appeals' approach it is *ipso facto* liable to every person of that race wherever found. Once again, the respondents are attempting to establish a critical constituent element of their cause of action by negative inference, *i.e.*, the employer has not proved that the plaintiff class was not discriminated against.

Thus, the respondents' reliance on undifferentiated population statistics as the totality of their *prima facie* case emasculates plaintiffs' burden of proof and permits a finding of liability without the requisite showing that the statistic supports the inference and that the inference adversely impacted the plaintiff class. The adversary process has been turned on its head without justification by the Court of Appeals or explanation by the respondents.

In reality, the Plaintiffs are asking the Court to articulate a burden of proof which would state that Defendants are presumptively liable under Title VII if their work force does not reflect the same proportion of minority persons as the population of the standard metropolitan statistical area at the time of the latest census. In essence, the Plaintiffs are asking the Court to disregard the plain wording of Title VII which provides in applicable part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section or other area or in the available work force in any community, state, section or other area. 42 U.S.C. § 2000(e)-2(j).

III. PLAINTIFFS' ATTEMPTS TO CURE THE INADEQUACIES OF THEIR CASE BY REFERENCE TO THE RECORD IN ANOTHER LAWSUIT SHOULD BE DISREGARDED BY THE COURT.

Respondents, aided by their *amicus* the NAACP Legal Defense Fund, Inc., seek to overcome the deficiencies of the evidence in this case by asking the Court to take judicial notice of the facts adduced at trial in the case of *U.S.* v. *East Texas Motor Freight & Int'l. Brotherhood of Teamsters*, 10 CCH EPD ¶ 10,345 (N. D. Tex. May 28, 1975). It seems singularly inappropriate for respondents who argue that they have met their burden of proof below to seek to admit for the first time in the Supreme Court evidence introduced at a later trial in a different court, between different parties.

In *United States* v. *East Texas Motor Freight*, the United States of America filed suit against ETMF, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and the International Association of Machinists and Aerospace Workers alleging that the Defendants were en-

gaged in a "pattern and practice" of discrimination in violation of Title VII of the Civil Rights Act and Executive Order No. 11246. *See* 42 U.S.C. § 2000(e)-6. The allegations concerned employees throughout East Texas Motor Freight's system and were not confined, as was the case in the proceedings below, to employees in the State of Texas. On February 18, 1974, ETMF entered into a Consent Decree in partial resolution of the suit initiated by the United States. In the Consent Decree subsequently approved by Judge Hughes, it was stated that "This Decree shall be binding upon the parties hereto, and it is their intention to fully settle by this Decree all issues raised by the Plaintiffs in its Complaint and occurring prior to the entry of this Decree." (App. at 424-25). The Union Defendants were not parties to the Consent Decree, and the case went to trial solely on issues relating to the collective bargaining agreements and the liability of the Union Defendants. Prior to that trial in a stipulation between the United States and the Defendant East Texas Motor Freight, the employer agreed that it "will not introduce evidence herein showing that business necessity requires denying incumbent Affected Class members the right to transfer to road driving or other positions and to carry over their seniority to such positions, for all purposes." (App. at 447). Thus, the procedural posture of the case was such that there was no purpose for East Texas Motor Freight to participate actively in that trial as an adversary of the United States. In fact, ETMF stipulated that it would not even introduce evidence on a central issue in the second phase of this litigation.

District Judge Hughes recognized East Motor Freight's limited participation at the trial of the seniority issues and held in her order setting forth findings of fact and conclusions of law that:

> The foregoing Order applies solely to the Unions. And the position of the Plaintiffs and Defendant East Texas Motor Freight Lines, Inc., as between them, continues to be controlled by the terms of the Court's Consent Decree of February 18, 1974, which remains in full force and effect. . . . This Order constitutes and completes adjudication of all claims of Plaintiffs against both Defendant Unions, assessing all costs equally between the Government and Defendant Teamsters.

United States v. *East Texas Motor Freight, Teamsters Union and Machinists Union*, 10 CCH EPD ¶ 10,345 at 5418 (N.D. Tex. 1975).

The District Court, in that opinion, made reference to the Consent Decree as providing "full and complete" relief against East Texas Motor Freight. It was the claims of the Plaintiff against the Unions that had been left unresolved, and the trial was on issues litigated solely between the United States and the Teamsters. Because East Texas Motor Freight voluntarily settled all its disputes with the government prior to the second phase of the litigation and thereby utilized the preferred method of resolving claims under Title VII of the Civil Rights Act, it had no reason to and, as a result, did not challenge the authenticity of physical evidence and the credibility of the witnesses who testified in the trial of *United States* v. *East Texas Motor Freight*. When viewed in the circumstantial perspective of the second phase of the *United States* v. *East Texas Motor Freight* litigation, there is no merit to the contention of Petitioners and *amicus* that it is appropriate for the Court herein to adopt evidence submitted in *United States* v. *East Texas Motor*

Freight to bolster the record made by the Plaintiff in the District Court against East Texas Motor Freight. *Cf. Hertz* v. *Graham*, 23 F.R.D. 17, 20 (S.D.N.Y. 1958).

There has been a longstanding judicial reluctance to accept evidence *dehors* the record. *See, e.g., Thomson* v. *Gaskill*, 315 U.S. 442, 446 (1942); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589-90 (1939); *Henneford* v. *Northern Pacific Ry. Co.*, 303 U.S. 17, 19 (1938); *Claasen* v. *United States*, 142 U.S. 140, 148 (1891); *Schley* v. *Pullman's Palace Car Co.*, 120 U.S. 575, 578 (1887); *Coalition* v. *Brinegar*, 518 F.2d 522, 527 (4th Cir. 1975) (reviewing court will not consider and weigh after-discovered evidence); *United States* v. *Addonizio*, 449 F.2d 100, 103 (3rd Cir. 1971) ("It is 'hornbook law' that a court of appeals may consider only facts of record, and it is the record alone which controls the facts") (citing many federal cases); *Duran* v. *United States*, 413 F.2d 596, 605 (9th Cir. 1969), *cert. denied*, 396 U.S. 917 (1969); *United States* v. *Wood*, 295 F.2d 772, 775, n. 3 (5th Cir. 1961); *American Bemberg Corp.* v. *United States*, 253 F.2d 691, 694 (3rd Cir. 1958); *United States* v. *Sinor*, 238 F.2d 271, 277 (5th Cir. 1956), *cert. denied*, 353 U.S. 985 (appellate court cannot give credence to factual recitals which might have been made but were not presented to the trial court); and *Seward* v. *South Florida Securities*, 96 F.2d 964-65 (5th Cir. 1938).

The basis for this well-established judicial policy was recently articulated by Professor Kenneth Culp Davis and incorporated into the Advisory Committee's notes to Federal Rule of Evidence 201 which governs the question of judicial notice:

> The reason we use trial-type procedure, I think, is that we make the practical judgment on the basis of experience, that taking evidence subject to cross-examination and rebuttal is the best way to resolve

> controversies involving disputes of adjudicated facts, that is, facts pertaining to the parties. The reason we require determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation and argument (either written or oral or both). They key to a fair trial is opportunity to use the appropriate weapon (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention. *A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law.* 69, 93 (1964).

Notes of Advisory Comm. on Federal Rules of Evidence, Rule 201, 28 U.S.C.A. Fed. R. Evid. pp. 54-55 (1975 e.d.).

The evidence that Respondents and *amicus attempt* to introduce for the first time before the Court has not been previously tested in a truly adversary proceeding. More importantly, it was submitted in an adversary proceeding in which the party against whom it is presently offered, East Texas Motor Freight, was not an active litigant. East Texas Motor Freight, in its Consent Decree, settled the claims raised by the government in this litigation. ETMF was entitled to the benefits of that settlement. *United States* v. *Armour Co.*, 402 U.S. 673, 681-82 (1971). At the subsequent trial, its status was analogous to that of the person joined in a lawsuit under Rule 19 of the Federal Rules of Civil Procedure because "in his absence complete relief cannot be accorded among those already parties." The District Court recognized this and specifically excluded East Texas Motor

Freight from the precedential effect of the final order. Therefore, none of the safeguards which support the limited exceptions to the tradional restraints against embellishing the record are present in this case. Both the Court of Appeals and the Respondents have attemped to recast the litigation as it was tried in the District Court, and transmute the record into a shape more amenable to the objectives they seek. This is a distortion of the appellate process and derogation of the adversary process.

Plaintiffs' constant refrain throughout this litigation has been that the trucking industry has been found liable in other cases. Now, the Respondents claim that East Texas Motor Freight has been found liable in another case which it had settled without admission of liability and, therefore, that they are entitled to recovery also. This theme is seen again in Respondents' brief at pages 69-70 where Respondents say:

> Petitioners seek to deflect, but do not meet, the main thrust of Respondents' case: ETMF's refusal to employ minority line drivers systemwide meant that Plaintiffs would have been hired as city drivers regardless of where they had initially applied.

It is clear that Respondents have missed the entire thrust of East Texas Motor Freight's argument concerning the burden of proof in a Title VII case. We assert that the Plaintiffs in a class action must prove more than the fact that the Defendants have discriminated against members of a certain race or national origin and that all of the class members are also members of that larger racial or national origin group. The named Plaintiffs must prove that the members of the

Plaintiff class were actually victims of that discrimination. Absent such a showing, there can be no recovery under Title VII of the Civil Rights Act.

CONCLUSION

For the reasons stated in Petitioner East Texas Motor Freight's brief on the merits and for further reasons contained herein, Petitioner East Texas Motor Freight respectfully prays that the decision of the Court of Appeals be reversed and the decision of the District Court be reinstated.

Respectfully submitted,

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